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HOUSE OF REPRESENTATIVES
REPT. 101-485
Part 3

AMERICANS WITH DISABILITIES ACT OF 1990

MAY 15, 1990.—Ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2273 which on May 9, 1989, was referred jointly to the Committee on Education and Labor, the Committee on Energy and Commerce, the Committee on Public Works and Transportation, and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2273) to establish a clear and comprehensive prohibition of discrimination on the basis of disability, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Americans with Disabilities Act of 1990"

(b) TABLE OF CONTENTS.—The table of contents is as follows:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) PURPOSE.—It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) AUXILIARY AIDS AND SERVICES.—The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) DISABILITY.—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I—EMPLOYMENT

SEC. 101. DEFINITIONS.

As used in this title:

(1) COMMISSION.—The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(2) COVERED ENTITY.—The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) EMPLOYEE.—The term "employee" means an individual employed by an employer.

(4) EMPLOYER.—

(A) The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) EXCEPTIONS.—The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(5) ILLEGAL USE OF DRUGS.—The term "drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act

(21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. The term "illegal use of drugs" does not mean the use of controlled substances taken under supervision of a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(6) PERSON, ETC.—The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(7) QUALIFIED INDIVIDUAL WITH A DISABILITY.—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential.

(8) DIRECT THREAT.—The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(9) REASONABLE ACCOMMODATION.—The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) UNDUE HARDSHIP.—

(A) IN GENERAL.—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) FACTORS TO BE CONSIDERED.—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at the facility; the effect on expenses, resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition and structure of the workforce of such entity; the geographic separateness, administrative, and fiscal relationship of the facility or facilities in question to the covered entity.

SEC. 102. DISCRIMINATION.

(a) GENERAL RULE.—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.—As used in subsection (a), the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) PREEMPLOYMENT.—

(A) PROHIBITED EXAMINATION OR INQUIRY.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION.—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such physical examination are used only in accordance with this title.

(4) EXAMINATION AND INQUIRY.—

(A) PROHIBITED EXAMINATIONS AND INQUIRIES.—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) ACCEPTABLE EXAMINATIONS AND INQUIRIES.—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) REQUIREMENT.—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

SEC. 103. DEFENSES.

(a) IN GENERAL.—It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) QUALIFICATION STANDARDS.—The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) RELIGIOUS ENTITIES.—

(1) IN GENERAL.—This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) RELIGIOUS TENETS REQUIREMENT.—Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

SEC. 104. ILLEGAL USE OF DRUGS AND ALCOHOL.

(a) QUALIFIED INDIVIDUAL WITH A DISABILITY.—For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is a current illegal user of drugs, when the covered entity acts on the basis of such use.

(b) Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer illegally using drugs, or has otherwise been rehabilitated successfully and is no longer illegally using drugs, or (ii) is participating in a supervised rehabilitation program and is no longer illegally using drugs, or (iii) is erroneously regarded as being an illegal user of drugs but is not illegally using drugs. Provided that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer illegally using drugs.

(c) AUTHORITY OF COVERED ENTITY.—A covered entity—

(1) may prohibit the use of alcohol or the illegal use of drugs at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who is an illegal user of drugs or an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the use of drugs or alcohol by the employee; and

(5) may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free workplace regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use, to comply with the standards established by such regulations.

(d) DRUG TESTING.—

(1) IN GENERAL.—For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) CONSTRUCTION.—Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for illegal use of drugs of job applicants or employees or making employment decisions based on such test results.

SEC. 105. POSTING NOTICES.

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act,

in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10).

SEC. 106. REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

SEC. 107. ENFORCEMENT.

(a) POWERS, REMEDIES, AND PROCEDURES.—The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 106, concerning employment.

(b) COORDINATION.—The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. Such agencies shall establish such coordinating mechanisms in memoranda of understanding or regulations implementing this title and the Rehabilitation Act of 1973.

SEC. 108. EFFECTIVE DATE.

This title shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

SEC. 201. DEFINITION.

As used in this title, the term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a department, agency, special purpose district, or other instrumentality of a State or a local government.

SEC. 202. DISCRIMINATION.

No qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or a local government.

SEC. 203. ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY.

(a) DEFINITION.—As used in this title, the term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(b) VEHICLES.—

(1) NEW BUSES, RAIL VEHICLES, AND OTHER FIXED ROUTE VEHICLES.—It shall be considered discrimination for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity to purchase or lease a new fixed route bus of any size, a new intercity rail vehicle, a new commuter rail vehicle, a new rapid rail vehicle, a new light rail vehicle to be used for public transportation, or any other new fixed route vehicle to be used for public transportation and for which a solicitation is made later than 30 days after the date of enactment of this Act, if such bus, rail, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) USED VEHICLES.—If a public entity purchases or leases a used vehicle to be used for public transportation after the date of enactment of this Act, such individual or entity shall make demonstrated good faith efforts to purchase or lease such a used vehicle that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(3) REMANUFACTURED VEHICLES.—If a public entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle to be used for public transportation, so as to extend its usable life for 5 years or more, the vehicle shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) PARATRANSIT AS A SUPPLEMENT TO FIXED ROUTE PUBLIC TRANSPORTATION SYSTEM.—

(1) IN GENERAL.—If a public entity operates a fixed route public transportation system to provide public transportation, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public transit entity that is responsible for providing public transportation to fail to provide paratransit or other special transportation services sufficient to provide a comparable level of services as is provided to individuals using fixed route public transportation to individuals with disabilities, including individuals who use wheelchairs, who cannot otherwise use fixed route public transportation and to other individuals associated with such individuals with disabilities in accordance with service criteria established under regulations promulgated by the Secretary of Transportation unless the public transit entity can demonstrate that the provision of paratransit or other special transportation services would impose an undue financial burden on the public transit entity.

(2) UNDUE FINANCIAL BURDEN.—If the provision of comparable paratransit or other special transportation services would impose an undue financial burden on the public transit entity, such entity must provide paratransit and other special transportation services to the extent that providing such services would not impose an undue financial burden on such entity.

(3) REGULATIONS.—

(A) FORMULA.—Regulations promulgated by the Secretary of Transportation to determine what constitutes an undue financial burden, for purposes of this subsection, may include a flexible numerical formula that incorporates appropriate local characteristics such as population.

(B) ADDITIONAL PARATRANSIT SERVICES.—Notwithstanding paragraphs (1) and (2), the Secretary may require, at the discretion of the Secretary, a public transit authority to provide paratransit services beyond the amount determined by such formula.

(d) COMMUNITY OPERATING DEMAND RESPONSIVE SYSTEMS FOR THE GENERAL PUBLIC.—If a public entity operates a demand responsive system that is used to provide public transportation for the general public, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to purchase or lease a new vehicle, for which a solicitation is made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to the general public.

(e) TEMPORARY RELIEF WHERE LIFTS ARE UNAVAILABLE.—With respect to the purchase of new buses, a public entity may apply for, and the Secretary of Transportation may temporarily relieve such public entity from the obligation to purchase new buses of any size that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(f) CONSTRUCTION.—

(1) IN GENERAL.—Any relief granted under subsection (e) shall be limited in duration by a specified date and the appropriate committees of the Congress shall be notified of any such relief granted.

(2) FRAUDULENT APPLICATION.—If, at any time, the Secretary of Transportation has reasonable cause to believe that such relief was fraudulently applied for, the Secretary of Transportation shall—

(A) cancel such relief, if such relief is still in effect; and

(B) take other steps that the Secretary of Transportation considers appropriate.

(g) NEW FACILITIES.—For purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to build a new facility that will be used to provide public transportation services, including bus service, intercity rail service, rapid rail service, commuter rail service, light rail service, and other service used for public transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(h) ALTERATIONS OF EXISTING FACILITIES.—With respect to a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. If such public entity is undertaking major structural alterations that affect or could affect the usability of the facility (as defined under criteria established by the Secretary of Transportation), such public entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving such area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(i) EXISTING FACILITIES, INTERCITY RAIL, RAPID RAIL, LIGHT RAIL, AND COMMUTER RAIL SYSTEMS, AND KEY STATIONS.—

(1) EXISTING FACILITIES.—Except as provided in paragraph (3), with respect to existing facilities used for public transportation, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to operate such public transportation program or activity conducted in such facilities so that, when viewed in the entirety, it is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) INTERCITY, RAPID, LIGHT, AND COMMUTER RAIL SYSTEMS.—With respect to vehicles operated by intercity, light, rapid, and commuter rail systems, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to have at least one car per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in any event in no less than 5 years.

(3) KEY STATIONS.—

(A) IN GENERAL.—For purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to make stations in intercity rail systems and key stations in rapid rail, commuter rail, and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(B) RAPID RAIL, COMMUTER RAIL, AND LIGHT RAIL SYSTEMS.—Key stations in rapid rail, commuter rail, and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

(C) INTERCITY RAIL SYSTEMS.—All stations in intercity rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act.

(D) PLANS AND MILESTONES.—The Secretary of Transportation shall require the appropriate public entity to develop a plan for compliance with this paragraph that reflects consultation with individuals with disabilities

affected by such plan and that establishes milestones for achievement of the requirements of this paragraph.

SEC. 204. REGULATIONS.

(a) ATTORNEY GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this title (other than section 203), and such regulations shall be consistent with this title and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) except, with respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(b) SECRETARY OF TRANSPORTATION.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations in an accessible format that include standards applicable to facilities and vehicles covered under section 203 of this title.

(2) CONFORMANCE OF STANDARDS.—Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

SEC. 205. ENFORCEMENT.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of this Act, or regulations promulgated under section 204, concerning public services. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

SEC. 206. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this title shall become effective 18 months after the date of enactment of this Act.

(b) FIXED ROUTE VEHICLES.—Section 203(b)(1), as regarding new fixed route vehicles, shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

SEC. 301. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The term "commerce" means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) COMMERCIAL FACILITIES.—The term "commercial facilities" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) PUBLIC ACCOMMODATION.—The following privately operated entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other similar place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaners, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service establishment; and

(L) a gymnasium, health spa, bowling alley, golf course. or other place of exercise or recreation.

(4) PUBLIC TRANSPORTATION.—The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(5) READILY ACHIEVABLE.—

(A) IN GENERAL.—The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense.

(B) DETERMINATION.—In determining whether an action is readily achievable, factors to be considered include—

(i) the nature and cost of the action needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at the facility; the effect on expenses, resources, or the impact otherwise of such action upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition and structure of the workforce of such entity; the geographic separateness, administrative and fiscal relationship of the facility or facilities in question to the covered entity.

SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) CONSTRUCTION.—

(1) GENERAL PROHIBITION.—

(A) ACTIVITIES.—

(i) DENIAL OF PARTICIPATION.—It shall be discriminatory to subject an individual with a disability or a class of individuals with disabilities, on the basis of such disability or disabilities, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) PARTICIPATION IN UNEQUAL BENEFIT.—It shall be discriminatory to afford an individual with a disability or a class of individuals with disabilities, on the basis of such disability or disabilities, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) SEPARATE BENEFIT.—It shall be discriminatory to provide an individual with a disability or a class of individuals with disabilities, on the basis of such disability or disabilities, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege,

advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) For purposes of sec. 302(b)(1)(A)(i)–(iii), the term "individual with a disability or a class of individuals with disabilities" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) INTEGRATED SETTINGS.—Goods, facilities, privileges, advantages, accommodations, or services shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) OPPORTUNITY TO PARTICIPATE.—Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) ADMINISTRATIVE METHODS.—An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) ASSOCIATION.—It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) SPECIFIC PROHIBITIONS.—

(A) DISCRIMINATION.—As used in subsection (a), the term "discrimination" shall include—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) FIXED ROUTE SYSTEM.—

(i) ACCESSIBILITY.—It shall be considered discrimination for an entity that uses a vehicle for a fixed route system to transport individuals not covered under section 203 or 304, to purchase or lease a bus or a vehi-

cle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs), except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

(ii) EQUIVALENT SERVICE.—If such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title that is not readily accessible to or usable by individuals with disabilities, it shall be discriminatory for such entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public.

(C) DEMAND RESPONSIVE SYSTEM.—As used in subsection (a), the term "discrimination" shall include, in the case of a covered entity that uses vehicles in a demand responsive system to transport individuals not covered under section 203 or 304, an incident in which—

(i) such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title, a failure to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public; and

(ii) such entity purchases or leases a bus or a vehicle that can carry in excess of 16 passengers for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public, except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

(3) SPECIFIC CONSTRUCTION.—Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

SEC. 303. NEW CONSTRUCTION IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES.

(a) APPLICATION OF TERM.—Except as provided in subsection (b), as applied to public accommodations and commercial facilities, the term "discrimination" as used in section 302(a) shall mean—

(1) a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) ELEVATOR.—Subsection (a) shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General de-

termines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

SEC. 304. PROHIBITION OF DISCRIMINATION IN PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal business of providing air transportation, and whose operations affect commerce.

(b) CONSTRUCTION.—As used in subsection (a), the term "discrimination against" includes—

(1) the imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;

(2) the failure of an entity to—

(A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

(C) remove barriers consistent with the requirements of section 302(b)(2)(A) (iv), (v), and (vi);

(3) the purchase or lease of a new vehicle (other than an automobile or an over-the-road bus) that is to be used to provide public transportation services, and for which a solicitation is made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs (except in the case of a vehicle used in a demand response system, in which case the new vehicle need not be readily accessible to and usable by individuals with disabilities if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public); and

(4) the purchase or lease of a new over-the-road bus that is used to provide public transportation services and for which a solicitation is made later than 7 years after the date of enactment of this Act for small providers (as defined by the Secretary of Transportation) and 6 years for other providers, except as provided in section 305(d), that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

SEC. 305. STUDY.

(a) PURPOSE.—The Office of Technology Assessment shall undertake a study to determine—

(1) the access needs of individuals with disabilities to over-the-road buses; and

(2) the most cost effective methods for making over-the-road buses readily accessible to and usable by individuals with disabilities, particularly individuals who use wheelchairs.

(b) CONTENT.—The study shall analyze issues, including—

(1) the anticipated demand by individuals with disabilities for accessible over-the-road buses;

(2) the degree to which over-the road buses are readily accessible to and usable by individuals with disabilities;

(3) the cost of providing accessibility to over-the-road buses to individuals with disabilities, including recent technological and cost saving developments in equipment and devices providing such accessibility;

(4) possible design changes in over-the-road buses that could enhance such accessibility; and

(5) the impact of accessibility requirements on the continuation of inter-city bus service by over-the-road buses, with particular consideration of impact on rural service.

(c) ADVISORY COMMITTEE.—In conducting the study required by subsection (a), the Office of Technology Assessment shall establish an advisory committee, which shall consist of—

(1) members selected from among private operators using over-the-road buses, bus manufacturers, and lift manufacturers;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) DEADLINE.—The study required by subsection (a), along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and the Congress within 36 months after the date of enactment of this Act. If the President, after reviewing the study, determines that compliance with the requirements of section 304(a) on or before the applicable deadlines specified in section 304(b)(4) will result in a significant reduction in intercity bus service, each such deadline shall be extended by one additional year.

(e) REVIEW.—In developing the study required by subsection (a), the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792). The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d).

SEC. 306. REGULATIONS.

(a) ACCESSIBILITY STANDARDS.—Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format that shall include standards applicable to facilities and vehicles covered under section 302(b)(2) (B) and (C) and section 304.

(b) OTHER PROVISIONS.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the remaining provisions of this title not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

(c) STANDARDS.—Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

(d) INTERIM ACCESSIBILITY STANDARDS.—For new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 302(b)(2)(A)(vi) and 303, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 306(a), compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities.

SEC. 307. EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANIZATIONS.

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

SEC. 308. ENFORCEMENT.

(a) IN GENERAL.—

(1) AVAILABILITY OF REMEDIES AND PROCEDURES.—The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000a-3(a)) shall be the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303. Nothing in this section shall require an individual with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(2) INJUNCTIVE RELIEF.—In the case of violations of section 302(b)(2)(A)(iv) and (vi) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief

shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b) ENFORCEMENT BY THE ATTORNEY GENERAL.—

(1) DENIAL OF RIGHTS.—

(A) DUTY TO INVESTIGATE.—

(i) IN GENERAL.—The Attorney General shall investigate alleged violations of this title, and shall undertake periodic reviews of compliance of covered entities under this title.

(ii) ATTORNEY GENERAL CERTIFICATION.—On the application of a state or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including persons with disabilities are provided an opportunity to testify against such certification, certify that a state law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of the Act for the accessibility and usability of covered facilities under this title. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such state law or local ordinance does meet or exceed the minimum requirements of the Act.

(B) POTENTIAL VIOLATION.—If the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title or that any person or group of persons has been denied any of the rights granted by such title, and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) AUTHORITY OF COURT.—In a civil action under paragraph (1), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by this title;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) In counting the number of previous determinations of violations for purposes of determining whether a "first" or "subsequent" violation has occurred, determinations in the same trial on liability that the covered entity has engaged in more than one discriminatory act are to be counted as a single violation.

(4) PUNITIVE DAMAGES.—For purposes of subsection (b)(2)(B), the term "monetary damages" and "such other relief" does not include punitive damages.

(5) JUDICIAL CONSIDERATION.—In a civil action under paragraph (1), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

SEC. 309. EXAMINATIONS AND COURSES.

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SEC. 310. EFFECTIVE DATE.

This title shall become effective 18 months after the date of enactment of this Act.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

SEC. 401. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

(a) TELECOMMUNICATIONS.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

"(a) DEFINITIONS.—As used in this section—

"(1) COMMON CARRIER OR CARRIER.—The term 'common carrier' or 'carrier' includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h), any common carrier engaged in intrastate communication by wire or radio, and any common carrier engaged in both interstate and intrastate communication, notwithstanding sections 2(b) and 221(b).

"(2) TDD.—The term 'TDD' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

"(3) TELECOMMUNICATIONS RELAY SERVICES.—The term 'telecommunications relay services' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

"(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES.—

"(1) IN GENERAL.—In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

"(2) REMEDIES.—For purposes of this section, the same remedies, procedures, rights, and obligations under this Act that are applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication by wire or radio and common carriers engaged in both interstate and intrastate communication by wire or radio.

"(c) PROVISION OF SERVICES.—Each common carrier providing telephone voice transmission services shall provide telecommunications relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment of this section.

"(d) REGULATIONS.—

"(1) IN GENERAL.—The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that—

"(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

"(B) establish minimum standards that shall be met by common carriers in carrying out subsection (c);

"(C) require that telecommunications relay services operate every day for 24 hours per day;

"(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

"(E) prohibit relay operators from refusing calls or limiting the length of calls that use telecommunications relay services;

"(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

"(G) prohibit relay operators from intentionally altering a relayed conversation.

"(2) TECHNOLOGY.—The Commission shall ensure that regulations prescribed to implement this section encourage the use of existing technology and do not discourage or impair the development of improved technology.

"(3) JURISDICTIONAL SEPARATION OF COSTS.—

"(A) IN GENERAL.—The Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

"(B) RECOVERING COSTS.—Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from the interstate jurisdiction and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.

"(C) JOINT PROVISION OF SERVICES.—To the extent interstate and intrastate common carriers jointly provide telecommunications relay services, the procedures established in section 410 shall be followed, as applicable.

"(4) FIXED MONTHLY CHARGE.—The Commission shall not permit carriers to impose a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunication relay services.

"(5) UNDUE BURDEN.—If the Commission finds that full compliance with the requirements of this section would unduly burden one or more common carriers, the Commission may extend the date for full compliance by such carrier for a period not to exceed 1 additional year.

"(e) ENFORCEMENT.—

"(1) IN GENERAL.—Subject to subsections (f) and (g), the Commission shall enforce this section.

"(2) COMPLAINT.—The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

"(f) CERTIFICATION.—

"(1) STATE DOCUMENTATION.—Each State may submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services.

"(2) REQUIREMENTS FOR CERTIFICATION.—After review of such documentation, the Commission shall certify the State program if the Commission determines that the program makes available to hearing-impaired and speech-impaired individuals either directly, through designees, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets the requirements of regulations prescribed by the Commission under subsection (d).

"(3) METHOD OF FUNDING.—Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

"(4) SUSPENSION OR REVOCATION OF CERTIFICATION.—The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted.

"(g) COMPLAINT.—

"(1) REFERRAL OF COMPLAINT.—If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

"(2) JURISDICTION OF COMMISSION.—After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

"(A) final action under such State program has not been taken on such complaint by such State—

"(i) within 180 days after the complaint is filed with such State; or

"(ii) within a shorter period as prescribed by the regulations of such State; or

"(B) the Commission determines that such State program is no longer qualified for certification under subsection (f)."

(b) CONFORMING AMENDMENTS.—The Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended—

(1) in section 2(b) (47 U.S.C. 152(b)), by striking "section 223 or 224" and inserting "sections 223, 224, and 225"; and

(2) in section 221(b) (47 U.S.C. 221(b)), by striking "section 301" and inserting "sections 225 and 301".

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. CONSTRUCTION.

(a) REHABILITATION ACT OF 1973.—Nothing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) OTHER LAWS.—Nothing in this Act shall be construed to invalidate or limit any other Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

(c) INSURANCE.—Titles I through IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance:

Provided, That paragraphs (1), (2), and (3) are not used as a subterfuge to evade the purposes of title I and III.

(d) ACCOMMODATIONS AND SERVICES.—Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

SEC. 502. PROHIBITION AGAINST RETALIATION AND COERCION.

(a) RETALIATION.—No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) INTERFERENCE, COERCION, OR INTIMIDATION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES.—The remedies and procedures available under sections 107, 205, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.

SEC. 503. STATE IMMUNITY.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD.

(a) ISSUANCE OF GUIDELINES.—Not later than 9 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III.

(b) CONTENTS OF GUIDELINES.—The guidelines issued under subsection (a) shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) QUALIFIED HISTORIC PROPERTIES.—(1) The guidelines issued under subsection (a) shall include guidelines and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in the Uniform Federal Accessibility Standards 4. 1. 7(1)(a).

(2) Regarding alterations of buildings or facilities that are covered by the requirements of Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470, and the guidelines issued under paragraph (i) shall, at a minimum, maintain the procedures and standards established in the Uniform Federal Accessibility Standards 4. 1. 7 (1) and (2).

(3) Regarding alterations of qualified historic buildings designated as historic under a statute of the appropriate state or local government body, the guidelines issued under paragraph (i) shall establish procedures equivalent to those established by the Uniform Federal Accessibility Standards 4. 1. 7(1)(b) and (c), and shall require, at a minimum, compliance with the minimum requirements established in Uniform Federal Accessibility Standards 4. 1. 7(2).

SEC. 505. ATTORNEY'S FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

SEC. 506. TECHNICAL ASSISTANCE.

(a) PLAN FOR ASSISTANCE.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the National Council on Disability, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chair of Federal Communications Commission, shall develop a plan to assist entities covered under this Act, along with other executive agencies and commissions, in understanding the responsibility of such entities, agencies, and commissions under this Act.

(2) PUBLICATION OF PLAN.—The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with the Administrative Procedure Act (5 U.S.C. 551 et seq.).

(b) AGENCY AND PUBLIC ASSISTANCE.—The Attorney General is authorized to obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) IMPLEMENTATION.—

(1) AUTHORITY TO CONTRACT.—Each department or agency that has responsibility for implementing this Act may render technical assistance to individuals and institutions that have rights or responsibilities under this Act.

(2) IMPLEMENTATION OF TITLES.—

(A) TITLE I.—The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance, as described in subsection (a), for title I.

(B) TITLE II.—

(i) IN GENERAL.—Except as provided for in clause (ii), the Attorney General shall implement such plan for assistance for title II.

(ii) EXCEPTION.—The Secretary of Transportation shall implement such plan for assistance for section 203.

(C) TITLE III.—The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III.

(D) TITLE IV.—The Chair of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) TECHNICAL ASSISTANCE MANUALS.—Each department or agency as part of its implementation responsibilities, shall ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or responsibilities under this Act, no later than six months after applicable final regulations are published for titles I, II, III, and IV of this Act.

(d) GRANTS AND CONTRACTS.—

(1) IN GENERAL.—Each department and agency having responsibility for implementing this Act may make grants or enter into contracts with individuals, profit institutions, and nonprofit institutions, including educational institutions and groups or associations representing individuals who have rights or duties under this Act, to effectuate the purposes of this Act.

(2) DISSEMINATION OF INFORMATION.—Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) FAILURE TO RECEIVE ASSISTANCE.—An employer, public accommodation, or other entity covered under this Act shall not be excused from meeting the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

SEC. 507. FEDERAL WILDERNESS AREAS.

(a) STUDY.—The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) SUBMISSION OF REPORT.—Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.

SEC. 508. TRANSVESTITES.

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. 509. CONGRESSIONAL INCLUSION.

(a) IN GENERAL.—Notwithstanding any other provision of this Act or of law, the provisions of this Act shall, subject to subsection (b), apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof.

(b) HOUSE EMPLOYEES.—

(1) IN GENERAL.—The rights and protections under this Act shall apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) ADMINISTRATION.—In the administration of this subsection, the remedies and procedures under the Fair Employment Practices Resolution shall be applied. As used in this paragraph, the term "Fair Employment Practices Resolution" means House Resolution 558, One Hundredth Congress, agreed to October 4, 1988, as continued in effect by House Resolution 15, One Hundred First Congress, agreed to January 3, 1989.

SEC. 510. ILLEGAL USE OF DRUGS.

(a) For purposes of this Act, an individual with a disability does not include an individual who is a current illegal user of drugs, when the covered entity acts on the basis of such use.

(b) Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer illegally using drugs, or has otherwise been rehabilitated successfully and is no longer illegally using drugs, or (ii) is participating in a supervised rehabilitation program and is no longer illegally using drugs, or (iii) is erroneously regarded as being an illegal user of drugs but is not illegally using drugs. Provided that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer illegally using drugs.

(c) Notwithstanding subsection (a) and section 511(d), an individual shall not be denied health or social services on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

SEC. 511. DEFINITIONS.

(a) HOMOSEXUALITY AND BISEXUALITY.—For purposes of the definition of "disability" in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

(b) CERTAIN CONDITIONS.—Under this Act, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.

(a) HANDICAPPED INDIVIDUAL.—Section 7(8)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)) is amended—

(1) in the first sentence, by striking out "Subject to the second sentence of this subparagraph" and inserting instead "Subject to subparagraphs (C) and (D)";

(2) by striking the second sentence;

(3) by inserting after subparagraph (B) the following:

"(C) For purposes of subchapter V of this Act the term 'individual with handicaps' does not include an individual who is a current illegal user of drugs, when a recipient acts on the basis of such use."; and

(4) by redesignating subparagraph (C) as subparagraph (D).

(b)(1) Nothing in subsection (a) shall be construed to exclude as an individual with handicaps an individual who (A) has successfully completed a supervised drug rehabilitation program and is no longer illegally using drugs, or has otherwise been rehabilitated successfully and is no longer illegally using drugs, or (B) is participating in a supervised rehabilitation program and is no longer illegally using drugs, or (C) is erroneously regarded as being an illegal user of drugs but is not illegally using drugs. Provided that it shall not be a violation of this Act for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer illegally using drugs.

(2) Notwithstanding subsection 1(a), for purposes of programs and activities providing health services and services provided under title I, II and III of the Rehabilitation Act of 1973, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(3) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the illegal use or possession of drugs or alcohol against any handicapped student who currently and illegally uses drugs or alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

(4) For purposes of sections 503 and 504 of this Act as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(5) Section 7 of the Rehabilitation Act is further amended by adding at the end thereof the following new paragraph:

"(22) The term 'drugs' means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. The term 'illegal use of drugs' does not mean the use of controlled substances taken under supervision of a licensed health professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law."

SEC. 513. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

SEC 514. SEVERABILITY.

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

Explanation of the Amendment in the Nature of a Substitute

The amendment in the nature of a substitute adopted by the Committee is modeled after bills ordered reported by other Committees with jurisdiction over the bill and S. 933 as passed by the Senate. The bill differs in significant respects from the bill as introduced.

The amendment differs from the bill as introduced primarily in the following respects: The amendment deletes the general provisions title of the bill (title I), and incorporates those provisions in the remaining titles of the amendment. The amendment adds specific provisions, discussed below, detailing obligations under the employment, public services, public accommodations, and telecommunications titles. The amendment adds miscellaneous provisions, including coverage of Congress, technical assistance, and the exclusion from coverage of individuals discriminated against because of current illegal use of drugs and other specific conditions.

Purpose of the Bill as Amended by the Committee

The purpose of the Americans with Disabilities Act (ADA), H.R. 2273 as amended, is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life. The ADA provides enforceable standards addressing discrimination against individuals with disabilities and ensures that the federal government will play a central role in enforcing these standards on behalf of individuals with disabilities. Each title specifies the role of federal agencies in promulgating regulations, conducting compliance reviews, pursuing litigation and providing guidance and technical assistance regarding the requirements of the Act.

Amendments Adopted by the Committee

The Committee adopted 5 amendments to the bill ordered reported by the Subcommittee. An amendment added a new section to the bill, Section 513, to encourage the use of alternative dispute resolution where appropriate and to the extent authorized by law. An amendment added additional factors to be considered in making a determination of what constitutes an undue hardship under title I and what is readily achievable under title III. An amendment clarified that the remedies incorporated by reference in titles I, II and III are the remedies that the ADA provides, and that the incorporated remedies are the remedies currently available. If those remedies are amended in the future, such remedies will also apply to the ADA.

An amendment clarified the "direct threat" provision, the phrase "essential functions" of a job, and the "anticipatory discrimination" provision. This amendment also clarified what entities are covered under the general rule of title III, that commercial facilities are covered by the alterations provisions, and that exams and classes relating to applications, licensing, certifications, or credentialing must be held in an accessible place and manner. An amend-

ment made technical changes to the interim accessibility standards under title III.

HISTORY

Federal civil rights protections for individuals with disabilities were first established by title V of the Rehabilitation Act of 1973.[1] Sections 501 and 503 of the Rehabilitation Act prohibit the federal government and most federal contractors from discriminating in employment, and requires them to use affirmative action to employ persons with disabilities. Section 504 of the Rehabilitation Act goes beyond employment, and prohibits discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance.

The Americans with Disabilities Act was first introduced in 1988 during the 100th Congress.[2] This first bill was drafted by the National Council on Disability,[3] an independent federal agency charged with assessing the condition of persons with disabilities and making legislative recommendations. H.R. 4498 was referred to 4 Committees in the House, and was the subject of a joint hearing by subcommittees of the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources.

Also in the 100th Congress, the Committee on the Judiciary considered amendments to the Fair Housing Act, title VIII of the Civil Rights Act of 1968, to prohibit discrimination against persons with disabilities in the sale or rental of housing. The amendments were enacted [4] to prohibit discrimination against persons with disabilities, to require that certain new multifamily housing units be accessible to and usable by persons with disabilities, and that units have adaptable features to meet individual needs of persons with disabilities.

The Americans with Disabilities Act was reintroduced, in a modified form, in the 101st Congress.[5] The bill as introduced again established a clear and comprehensive prohibition of discrimination on the basis of disability, in employment, public services, public accommodations and telecommunications, but responded to a number of concerns raised about the 1988 bill. The Subcommittee on Civil and Constitutional Rights conducted 3 hearings on the bill, and the Committee held one hearing, receiving testimony from the Attorney General of the United States.[6]

On April 25, 1990, the Subcommittee on Civil and Constitutional Rights, by a recorded vote of 7-1, ordered favorably reported to the Committee, H.R. 2273, as amended by an amendment in the nature of a substitute. The Committee considered H.R. 2273, as amended,

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[1] P.L. 93-112, 29 U.S.C. 791, *et seq.*

[2] H.R 4498, introduced by Mr. Coelho, and S. 2345, by Mr. Weicker.

[3] The National Council on Disability, then called the National Council on the Handicapped, is an independent federal agency first established by title IV of the Rehabilitation Act of 1973, 29 U.S.C. 780, as an advisory board within the Department of Education. In 1984 the Council was transformed into an independent federal agency by the Rehabilitation Act Amendments of 1984, P.L. 98-221.

[4] P.L. 100-430, 42 U.S.C. 3601 *et seq.*

[5] Mr. Coelho introduced the bill, H.R. 2273, in the House and Mr. Harkin introduced a companion bill in the Senate, S. 933.

[6] Hearings on H.R. 2273, the Americans with Disabilities Act, before the Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights, 101st Congress, 1st Session, Serial No. 58.

on May 1 and 2, 1990. On May 2, by a recorded vote of 32-3, the Committee ordered H.R. 2273 reported favorably to the House, with a single amendment in the nature of a substitute.

BACKGROUND AND NEED

A recent survey conducted by Louis Harris and Associates found that Americans with disabilities are notably underprivileged and disadvantaged. Compared with persons without disabilities, persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life.[7] Historically, the inferior economic and social status of disabled people has been viewed as an inevitable consequence of the physical and mental limitations imposed by disability.

Over the years, this assumption has been challenged by policy makers, citizens with disabilities, the courts and Congress. Gradually, public policy affecting persons with disabilities recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities. These discriminatory policies and practices affect people with disabilities in every aspect of their lives, from securing employment, to participating fully in community life, to securing custody of their children, to enjoying all of the rights that Americans take for granted.

The first major challenge to the notion that being disabled meant lifelong economic dependency was the enactment of the first Rehabilitation Act, the Fess-Kenyon Act of 1920,[8] which was prompted by the return of a vast number of disabled World War I veterans, and the ever-increasing incidence of industrial accidents. By the mid-1960's, the integration of disabled people into the mainstream of American life was the explicit goal of rehabilitation policy.

From a civil rights perspective, a profound and historic shift in disability public policy occurred in the 1970's. Through landmark litigation [9] and legislation,[10] Americans with disabilities were rec-

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[7] Louis Harris and Associates, The ICD [International Center for the Disabled] Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream, (1986); *See also,* The ICD Survey II: Employing Disabled Americans (1987); National Council on the Handicapped, Toward Independence (1986), and On the Threshold of Independence (1988); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983); and Presidential Commission on the Human Immunodeficiency Virus Epidemic, Report of the Commission, (1988).

[8] 41 Stat. 735.

[9] Two landmark cases *Pennsylvania Association for Retarded Children* v. *Pennsylvania,* 334 F. Supp. 1257 (E.D.Pa. 1971); and *Mills* v. *Board of Education of the District of Columbia,* 348 F. Supp. 866 (D.D.C. 1972), held that disabled children who had previously been excluded from public education had the right to a public education appropriate to their educational needs.

[10] In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968, Architectural Barriers Act, 42 U.S.C. 4151 *et seq.* (required federally funded or leased buildings to be accessible); 1970, Urban Mass Transportation Act, 49 U.S.C. 1612 (required eligible jurisdictions to provide accessibility plan for mass transportation); 1973, Education for All Handicapped Children Act, 20 U.S.C. Section 1401 *et seq.* (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975, National Housing Act Amendments, 12 U.S.C. 1701 *et seq.* (provided for barrier removal in federally supported housing).

ognized for the first time as a minority group that was subject to discrimination, and worthy of basic civil rights protections.

This major shift in public policy relating to disability culminated in the passage of a broad anti-discrimination provision, Section 504 of the Rehabilitation Act of 1973. Section 504 bars discrimination by recipients of federal financial assistance against persons with disabilities in all the recipient's programs and activities. Section 504 recognizes that discrimination results from actions or inactions, and that discrimination occurs by effect as well as by intent or design. And Section 504 acknowledges, that, as in the finding 35 years ago by the Supreme Court in *Brown v. Board of Education*, in referring to the segregation of black students, that segregation for persons with disabilities "may affect their hearts and minds in a way unlikely ever to be undone." [11]

In 1973, during consideration of the Rehabilitation Act, Senator Harrison Williams said:

> for too long, we have been dealing with [the handicapped] out of charity. . . . I wish it to be said of America in the 1970's that when its attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law. . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is for the Congress and the Nation to assure that these rights are no longer denied.[12]

The Americans With Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964. This year, 1990, is an historic one in the evolution of this nation's public policy towards persons with disabilities. The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.

Section-by-Section Analysis

Following is a section-by-section analysis of the Americans with Disabilities Act as ordered reported by the Committee.

Section 1. Short title; table of contents

This Act may be cited as the "Americans with Disabilities Act of 1990." The use of the term "disabilities" instead of the term "handicaps" reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than "handicapped" as used in previous laws, such as the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988.

By this change in phraseology, the Committee does not intend to change the substantive definition of handicap. The Committee intends that the analysis of the term "individaul with handicaps"

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[11] 347 U.S. 483, 494 (1954).
[12] 118 Cong. Rec 3321-22 (1972).

contained in the primary regulations implementing the Rehabilitation Act of 1973,[13] and the term "handicap" contained in the primary regulations implementing the Fair Housing Amendments Act of 1988,[14] apply to the definition of "disability" in the ADA.

The ADA should also not be interpreted to be limited to "Americans" with disabilities. The use of the title "Americans with Disabilities" reflects the belief that individuals with disabilities compose an integral part of our nation's makeup, and, like all other individuals, are entitled to equal access and opportunity. As in other civil rights laws, however, the ADA should not be interpreted to mean that only American citizens are entitled to the protections afforded by the Act.

Section 2. Findings and purposes

This section sets forth the findings and purposes of the Congress in enacting the ADA.

Section 3. Definitions

This section defines two terms: "auxiliary aids and services" and "disability."

Section 3(1)—Auxiliary aids and services

This section defines "auxiliary aids and services" to include services and devices which may be necessary to assure full and equal participation by persons with disabilities in the services and activities of public entities covered under title II and of public accommodations covered under title III.

Section 3(2)—Disability

The ADA uses the same basic definition of "disability" first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. This definition was adopted for a number of reasons. First, it has worked well since it was adopted in 1973. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may develop in the future, as they have since the definition was first established in 1973.

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the ADA.

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[13] 45 CFR, Part 84.

[14] 24 CFR, Part 100.

Test A.—A physical or mental impairment that substantially limits one or more of the major life activities of such individual

Physical or mental impairment.—Under the first test, an individual must have a physical or mental impairment. This means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[15]

Although the definition does not include a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments,[16] examples include: orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy; infection with the Human Immunodeficiency Virus; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; drug addiction [17] and alcoholism.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural or economic disadvantages, such as having a prison record, or being poor. Age is not a disability. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the ADA based on the impairment.

Substantial limitation of a major life activity.—Under the first test, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

For example, a paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning.[18]

The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the

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[15] This is the list used in the regulations for Section 504 of the Rehabilitation Act of 1973, 45 CFR 84.3(j)(2)(i).

[16] The definition is specifically designed to be able to incorporate new conditions and diseases that may affect individuals in the future.

[17] The current illegal use of drugs is not protected by the ADA. *See*, Sections 104 and 510.

[18] Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under this first test of the definition. *See*, Memorandum of Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, September 27, 1988, at 3; *reprinted in* Hearings on S. 933, the Americans with Disabilities Act, before the Committee on Labor and Human Resources, 101st Congress, 1st Session, S Hrg. 101-156, at 346

effects of the impairment which substantially limits a major life activity, is also covered, even if the hearing loss is corrected by the use of a hearing aid.

A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in he major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.

However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. The cause of a disability is always irrelevant to the determination of disability. In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used.

Test B.—A record of such an impairment

This test is intended to cover those who have a record of an impairment. This includes a person who has a history of an impairment that substantially limited a major life activity, such as those who have recovered from an impairment. It also includes persons who have been misclassified as having an impairment. Examples include a person who had, but no longer has, cancer, or a person who was misclassified as being mentally retarded.

Test C.—Being regarded as having such an impairment

This test is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment that substantially limits a major life activity.

The ADA uses the same "regarded as" test set forth in the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide:

> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.[19]

[19] 45 CFR 84.3(j)(2)(iv). Paragraph (j)(2)(i) is discussed at footnote 15.

The perception of the covered entity is a key element of this test. A person who perceives himself to have an impairment, but does not have an impairment, and is not treated as if he has an impairment, is not protected under this test.

A person would be covered under this test if an employer refused to hire, or a restaurant refused to serve, that person because of a fear of "negative reactions" of others to that person. A person would also be covered if an entity perceived that the applicant had an impairment which prevented the person from working, or if a public accommodation refused to serve a patron because it perceived that the patron had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, severe burn victims often face discrimination in employment and participation in community activities which results in substantial limitation of major life activities. These persons would be covered under this test because of the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline.*[20] The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." [21]

The Court concluded that, by including this test, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." [22]

Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers.

This list of frequent workplace concerns is not exhaustive. It illustrates, however, the attitudinal barriers that Congress clearly intended to include within the meaning of "regarded as" having a disability under the Rehabilitation Act and now under the ADA.

It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related

[20] 480 U.S. 273 (1987).
[21] 480 U.S. at 283.
[22] 480 U.S. at 284.

reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate, *e.g.*, that he will be accepted by others, or that insurance rates will not increase, in order to be qualified for the job.

For example, many people are rejected from jobs because a back x-ray reveals some anomaly, even though the person has no symptoms of a back impairment. The reasons for the rejection are often the fear of injury, as well as increased insurance or worker's compensation costs. These reasons for rejection rely on common barriers to employment for persons with disabilities and therefore, the person is perceived to be disabled under the third test.

Behaviors and conditions not included as disabilities

In other sections of the bill, certain behaviors are explicitly not included as disabilities. Current illegal use of drugs is not protected under the bill. *See* Sections 104 and 510. Homosexuality and bisexuality, which were never covered disabilities under other federal disability laws, because they are not physical or mental impairments, are explicitly noted as not being impairments and as such are not disabilities under the ADA. *See* Section 511(a). Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs, are also excluded. *See* Sections 511(b)–(d).

TITLE I—EMPLOYMENT

Title I prohibits discrimination in employment against a qualified person with a disability. The title borrows much of its procedural framework from title VII of the Civil Rights Act of 1964,[23] which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, by incorporating title VII's enforcement provisions, notice posting provisions, and employer coverage provisions. The title borrows much of its substantive framework from Section 504 of the Rehabilitation Act of 1973.

The underlying premise of this title is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive. Discrimination occurs against persons with disabilities because of stereotypes, discomfort, misconceptions, and fears about increased costs and decreased productivity.

In order to assure a match between job criteria and an applicant's actual ability to do the job, the bill contains the following provisions:

[23] 42 U.S.C. 2000e *et seq.*

the requirement that persons with disabilities not be disqualified because of the inability to perform non-essential or marginal functions of the job [Section 101(7)];

the requirement that any selection criteria that screen out or tend to screen out people with disabilities be job-related and consistent with business necessity [Section 102(b)(6)]; and

the requirement to provide reasonable accommodation to assist persons with disabilities to meet legitimate job criteria [Section 102(b)(5)].

These requirements work together to eliminate the pervasive bias against employing persons with disabilities.

If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, and not marginal, aspect of the job. The criterion must be carefully tailored to measure the actual ability of a person to perform an essential function of the job. If the criterion meets this test, it is not discriminatory on its face and is not prohibited by the ADA. If the legitimate criterion can be satisfied by the applicant with a reasonable accommodation, then the reasonable accommodation must be provided under Section 102(b)(5).

Section 101. Definitions

A number of definitions from title VII of the Civil Rights Act of 1964 are incorporated by reference in this title ("person," "labor organization," "employment agency," "commerce," and "industry affecting commerce"). Other terms, such as "Commission" and "employer" use the same concepts as contained in title VII. The definition of "employer" differs from title VII only to allow a phase-in for the first two years the law is in effect for employers employing less than 25 employees. "Employee" means an individual employed by an employer. The exception set out in title VII for elected officials and their employees and appointees is not incorporated in the ADA.

Section 101(5)—Illegal use of drugs

The term "drugs" means controlled substances as listed in schedules I through V of Section 202 of the Controlled Substances Act.[24] The Controlled Substances Act makes unlawful certain possession or distribution of listed drugs. The Committee does not intend to affect the Controlled Substances Act. The term "Illegal use of drugs" does not include the use of controlled substances, including the use of experimental drugs, taken under the supervision of a licensed health care professional. It also does not include uses authorized by the Controlled Substances Act or other provisions of federal law.

Section 101(7)—Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with a reasonable accommodation if

[24] 21 U.S.C. 812.

necessary, can perform the essential functions of the employment position that such individual holds or desires.

This same concept is used in the regulations implementing Sections 501 and 504 of the Rehabilitation Act of 1973. The phrase "essential functions" means job tasks that are fundamental and not marginal. The regulations point out that "inclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job." [25]

For example, many employers require driver's licenses for a variety of jobs which do not require driving or where driving is incidental to the job. A driver's license is often required because it is presumed that people who drive to work are more likely to arrive at work on time or because a driver can do an occasional errand. The "essential functions" requirement assures that a person who cannot drive because of his or her disability is not disqualified for these reasons if he or she can do the actual duties of the job.

In one case, a person with epilepsy applied for the job of group counselor at a juvenile hall. After receiving a job offer, the offer was withdrawn when the employer learned that the applicant did not have a driver's license. Driving was required for emergencies, to take a juvenile to the hospital, for example, and to transport the juveniles to court appearances. While it was necessary that some of the group counselors be able to drive, it was not essential that all group counselors be available to drive. On any given shift, another group counselor could perform the driving duty. Hence, it is necessary to review the job duty not in isolation, but in the context of the actual work environment.

The incorporation of the requirement of reasonable accommodation into the definition of "qualified individual with a disability" is meant to indicate that essential functions are those which must be performed, even if the manner in which particular job tasks comprising those functions are performed, or the equipment used in performing them, may be different for an employee with a disability than for a non-disabled employee. For example, in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not "essential" that a person be able to use the keyboard or visually read the information from a computer screen. Adaptive equipment or software may enable a person with no arms or a person with impaired vision to control the computer and access information.

The Committee adopted additional language to this definition during its consideration of the bill. The language states explicitly that consideration shall be given to the employer's judgment as to what functions of a job are essential. Although essential functions need not be listed in a written form, a written list by an employer is a useful starting point for determining essential functions of a job. An amendment that would have created a presumption in favor of the employer's determination of essential functions was rejected.

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[25] 42 Fed. Reg. 22686 (1977).

This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer's determination of essential functions is considered. A plaintiff may challenge the employer's determination of what is an essential function.

The determination of whether a person is qualified should be made at the time of the employment action, *e.g.* hiring or promotion, and should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future. Nor can paternalistic concerns about what is best for the person with a disability serve to foreclose employment opportunities.

With respect to covered entities subject to rules promulgated by the department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, the Committee intends that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job-related and required by business necessity in order to be considered a qualified individual with a disability. By the effective date of this title, the Committee expects the Secretary of Transportation to review these requirements to determine whether they are valid under this Act. Of course, the Department of Transportation currently has an obligation under Section 504 of the Rehabilitation Act to ensure that its regulations are consistent with that Act.

Section 101(8)—Direct threat

This definition was added during Committee consideration of the bill. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. The Committee intends to codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline.*[26]

Section 101(9)—Reasonable accommodation

The term "reasonable accommodation" incorporates a range of actions that may be necessary to allow a person with a disability to perform the essential functions of a job.

Examples of possible accommodations include, but are not limited to, making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment of devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers for the visually impaired or interpreters for the hearing impaired, and other similar accommodations.

The requirements of reasonable accommodation are discussed under Section 102(b)(5) below.

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[26] 480 U.S. 273 (1987).

Section 101(10)—Undue hardship

The term undue hardship means an action requiring significant difficulty or expense. Undue hardship is determined by considering, at least, the overall size of the business, the site involved, and the nature and cost of the accommodation needed. Although an action may be a significant expense or result in significant difficulty in the abstract, or when considered with regard to a small employer, it may not be an undue hardship when considered in light of the size of the employer, the site involved and the accommodation needed.

The Committee adopted additional factors to be considered in making a determination of undue hardship. These additional factors are discussed under Section 102(b)(5) below.

Section 102. Discrimination

Section 102(a), General Rule. Discrimination is prohibited against a qualified individual with a disability in all parts of the employment process. Specifically included as part of the employment process are job application procedures, hiring, advancement, discharge, compensation, and job training, and other terms, conditions, and privileges of employment.

The Committee intends that the aspects of the employment process covered by the non-discrimination mandate be construed in a manner consistent with the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide that the anti-discrimination mandate applies in:

(1) recruitment, advertising, and the processing of applications for employment;

(2) hiring, updating, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) rates of pay or any other form of compensation and changes in compensation;

(4) job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) leaves of absence, sick leave, or any other leave;

(6) fringe benefits available by virtue of employment, whether or not administered by the [employer];

(7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leave of absence to pursue training;

(8) employer sponsored activities, including social or recreational programs.[27]

Discrimination is prohibited against a qualified individual with a disability, as defined in Section 101(7), and as discussed above. The Committee does not intend to cover individuals who do not meet the definition of qualified individual with a disability.

As with other civil rights laws prohibiting discrimination in employment, the Committee does not intend to limit the ability of cov-

[27] 45 CFR 84.11(b).

ered entities to choose and maintain a qualified workforce. Covered entities continue to have the ability to hire and employ employees who can perform the job. Employers can continue to use job-related criteria in choosing qualified employees. For example, in a job that requires lifting 50 pound boxes, an employer may test applicants and employees to determine whether they can lift 50 pound boxes. Similarly, an employer can continue to give typists typing tests to determine their abilities.

The Committee does not intend that covered entities have an obligation to prefer applicants with disabilities over other applicants on the basis of disability.

Section 102(b)—Construction

This section of the bill describes 7 specific types of discrimination included in the prohibition under Section 102(a).

Section 102(b)(1)—Limiting, segregating or classifying

Section 102(b)(1) prohibits an employer from limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee based on that person's disability.

For example, an employer could not adopt a different pay scale, benefits, promotion opportunities or working area for employees with disabilities. In one case, an employer had a separate job category for janitors with developmental disabilities with lower pay, no benefits or seniority rights, even though the job duties were the same as other janitors. This would be a violation of this title.

Section 102(b)(2)—Contractual relationships

Section 102(b)(2) provides that a covered entity may not participate in a contractual relationship that has the effect of subjecting the covered entity's qualified applicants or employees to discrimination. The phrase "the covered entity's" qualified applicants or employees was included in order to avoid any misunderstanding regarding this provision. This provision is intended to apply to a situation in which a covered entity "A" enters into a contractual relationship with another entity "B," which has the effect of subjecting the covered entity "A's" own employees or applicants to discrimination. It does not apply to a situation in which covered "A" enters into a contractual relationship with another entity "B," and that entity "B" is engaging in some form of discrimination against its own employees or applicants. Entity "A" carries no liability in such a situation for the discrimination of entity "B." Of course, entity "B" may be separately liable to suit under this Act, by its employees or applicants.

Section 102(b)(2) also provides that a covered entity may not participate in a contractual relationship that has the effect of subjecting the covered entity's qualified applicants or employees "to the discrimination prohibited by this title." The intent of this provision is that an entity may not do through a contractual provision what it may not do directly. The type of discrimination prohibited is that set forth in the substantive provisions of the bill. Thus, if the contractual relationship having the effect of discrimination occurs in any of the areas covered by this title, for example, in hiring, train-

ing or promotion of employees, to the extent that the requirement of reasonable accommodation, and the limitation of undue hardship, apply if the entity is acting directly, these requirements and limitations would apply as well when the entity is acting in a contractual relationship. The contractual relationship adds no new obligations in and of itself beyond the obligations imposed by the Act, nor does it reduce the obligations imposed by the Act.

For example, assume that an employer "C" is seeking to contract with a company "D" to provide training for the employees of employer "C". Whatever responsibilities and limitations of reasonable accommodation that would apply to the employer "C" if it provided the training itself would apply as well in the contractual situation. Thus, if the training company "D" were planning to hold its program in a physically inaccessible location, thus making it impossible for an employee who used a wheelchair to attend the program, the employer "C" would have a duty to consider various reasonable accommodations. These could include, for example, (1) asking the training company to identify other sites for the training that are accessible; (2) identifying other training companies that use accessible sites; (3) paying to have the training company train the disabled employee (either one-on-one or with other employees who may have missed the training for other reasons), or any other accommodation that might result in making the training available to the employee.

If no accommodations were available that would have made the training program accessible, or if the only options that were available would have imposed an undue hardship on the employer, the employer would have then met its requirements under the Act. The Committee anticipates, however, that some form of accommodation could be made so the disabled employee would not be precluded from receiving training that the employer may consider necessary.

As a further example, assume that an employer contracts with a hotel for a conference held for the employer's employees. Under the Act, the employer has an affirmaive duty to investigate the accessibility of a location that it plans to use for its own employees. Suggested approaches for determining accessibility would be for the employer to inspect the hotel first-hand, if possible, or to ask a local disability group to inspect the hotel. In any event, the employer can always protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, incuding the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a duty on the employer to investigate the accessibility of places that it contracts for will, in all likelihood, by the impetus for ensuring that these types of contractual provisions become commonplace in our society.

With respect to health insurance contracts, Section 501(c) of the Act specifically provides that the ADA does not affect pre-existing condition clauses included in insurance policies offered by employers. Employers may continue to offer policies that contain pre-ex-

isting condition exclusions, even though such exclusions adversely affect persons with disabilities, so long as such clauses are not used as a subterfuge to evade the purposes of this Act.

However, employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments (*e.g.*, a limit on the extent of kidneys dialysis or whether dialysis will be covered at all, or a limit on the amount of blood transfusions or whether transfusions will be covered). It would not be permissible, however, to deny coverage to individuals, such as persons with kidney disease or hemophilia, who are affected by these limits on coverage for procedures or treatments, for other procedures or treatments connected with their disability.[28] It would also not be permissible to deny coverage to such individuals for other conditions not connected with these limitions on coverage, such as treatment for a broken leg or heart surgery. While limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covererd, that limitation must apply to all persons, with or without disabilities. Persons with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

Section 102(b)(3)—Standards, criteria or methods of administration that have the effect of discrimination or that perpetuate discrimination

Section 102(b)(3) prohibits employers from using standards, criteria or methods of administration that have the effect of discrimination or that perpetuate discrimination by others who are subject to common administrative control.

For example, an employer could not enter into a contract for liability insurance with an insurance company who refused to cover accidents or injuries of persons with disabilities. Nor could the employer refuse to hire a person with a disability because the liability policy did not cover persons with disabilities.

Section 102(b)(4)—Association

Discrimination is also prohibited against a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

This provision protects persons who associate with persons with disabilities and who are discriminated against because of that association. This may include family, friends, and persons who provide care for persons with disabilities. The Committee rejected an amendment to limit this provision to the relatives (by blood, marriage, adoption or guaradianship) of persons with disabilities.

This provision applies only when the employer knows of the association with the other person and knows of that other person's disability. The burden of proof is on the individual claiming discrimination to prove that the discrimination was motivated by that individual's relationship or association with a person with a disability.

[28] Of course, if the insurance plan had a pre-existing condition clause which limited coverage for a specified time, that clause would govern to limit coverage.

For example, it would be discriminatory for an employer to discriminate against a qualified employee who did volunteer work for people with AIDS, if the employer knew of the employee's relationship or association with the people with AIDS, and if the employment action was motivated by that relationship or association.

Similarly, it would be illegal for an employer to discriminate against a qualified employee because that employee had a family member or a friend who had a disbility, if the employer knew about the relationship or association, knew that the friend or family member has a disability, and acted on that basis. Thus, if an employee had a spouse with a disability, and the employer took an adverse action against the employee based on the spouse's disability, this would then constitute discrimination.

This section would not apply if the employer did not know of the relationship or association, or if the employer did not know of the disability of the other person. Thus, if an employer fired an employee, and did not know of a relationship or association of the employee with a person with a disability, the employee could not claim discrimination under this section.

Section 102(b)(5)—Reasonable accommodation

An employer is required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. An employer may not deny employment opportunities if the denial is based on the need to make a reasonable accommodation. This reasonable accommodation requirement is central to the non-discrimination mandate of the ADA.

Section 101(9) provides examples of reasonable accommodations, including making changes in the physical environment in order to provide access, as well as changes in the structure of the job, such as part-time or modified work schedules. In other cases, the acquisition of modification of equipment, such as adaptive hardware or software for computers, telephone headset amplifiers, and the telecommunication devices will enable persons with disabilities to do the job. For some people with disabilities, the assistance of another individual, such as a reader, interpreter or attendant, may be necessary for specified activities.

The examples set forth in Section 101(9) are not meant to be exhaustive, but rather serve to illustrate the nature of the obligation. The employee or applicant must request a reasonable accommodation; the employer is not liable for failing to provide an accommodation if it was not requested.

A reasonable accommodation should be tailored to the needs of the individual and the requirements of the job. Persons with disabilities have vast experience in all aspects of their lives with the types of accommodations which are effective for them. Employers should not assume that accommodations are required without consulting the applicant or employee with the disability. Stereotypes about disability can result in stereotypes about the need for accommodations, which may exceed what is actually required. Consultations between employers and the persons with disabilities will result in an accurate assessment of what is required in order to perform the job duties.

In the event there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement, as long as the selected accommodation provides meaningful equal employment opportunity for the applicant or employee.

Like Sections 501, 503 and 504 of the 1973 Rehabilitation Act, the ADA provides that the employer is not required to provide accommodations if the employer demonstrates that providing such an accommodation will pose an undue hardship on the opeation of its business.

The ADA defines "undue hardship" in Section 101(10)(A) to mean an action requiring significant difficulty or expense, when considered in light of the factors set forth in subsection (B). This definition was included for two reasons. First, a definition of undue hardship was included in order to distinguish it from the definition of "readiily achievable" in title III governing the requirement to alter existing public accommodations. Readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense." The duty to provide reasonable accommodation, by contrast, is a much higher standard than the duty to remove barriers in existing buildings (if removing the barriers is readily achievable) and creates a more substantial obligation on the employer.

Second, a definition was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of title VII in *TWA v. Hardison,*[29] which held that accommodations to religious beliefs need not be provided if the cost was more than *de minimis* to the employer.

Thus, the definition of "undue hardship" in the ADA is intended to convey a significant, as opposed to a *de minimis* or insignificant, obligation on the part of employers. In determining whether this obligation is met, the legislation, like Sections 501, 503 and 504 of the Rehabilitation Act, sets forth a number of factors to be considered, including the size, budget and number of employees of the covered entity.

The ADA also sets forth additional factors which ae specifically addressed to entities which operate more than one facility. Concerns were expressed that a court would look only at the resources of the local facility involved, or only at the resources of the parent company, in determining whether an accommodation imposed an undue hardship. The Committee believes that both of these alternatives are unsatisfactory. Instead, the Committee intends that the resources of both the local facility involved and of the parent compnay, as well as the relationship between the two, be relevant to the undue hardship determination.

The Committee is responding particularly to concerns about employers who operate in depressed or rural areas and are operating at the margin or at a loss. Specifically, concern was expressed that an employer may elect to close a store if it is losing money or only marginally profitable rather than undertake significant investments to make reasonable accommodations to employees with dis-

[29] 432 U.S. 63 (1977).

abilities. The Committee does not intend for the requirements of the Act to result in the closure of neighborhood stores or in loss of jobs. The Committee intends for courts to consider in determining "undue hardship," whether the local store is threatened with closure by the parent company or is faced with job loss as a result of the requirements of this Act.

The Committee adopted an amendment which sets forth the site factors in Section 101(10)(B)(ii) and the parent company factors in Section 101(10)(B)(iii). Section 101(10)(B)(iv) addresses the fiscal and administrative relationship between the covered entity and the facility involved in the accommodation. By rearranging the factors in Section 101(10)(B), the Committee did not intend to give any single factor paticular weight. Rather, all of the listed factors should be included in an analysis of whether providing an accommodation would impose an undue hardship on a covered entity.

By including a number of factors the Committee intends to establish a flexible approach. The Committee rejected an amendment which would have set a fixed limit of over 10% of the disabled employee's salary as a *per se* undue hardship. The Committee believes that setting a ceiling on reasonable accommodation is inappropriate and that the flexible approach used under Section 504 of the Rehabilitation Act, which has been in operation for 17 years, is appropriate for the ADA as well.

The Committee bill added the phrase in subparagraph (A) "when considered in light of the factor set forth in subparagraph (B)" in order to emphasize that the standard is relative. Thus, an action which may be significant in the abstract may, in fact, still be required when considered in light of all the factors. Only those accommodations which would require significant difficulty or expense when considered in light of the size, resources and structure of the employer would be considered an undue hardship.

The flexible approach is illustrated by a leading Section 504 case, *Nelson* v. *Thornburgh.*[30] In that case, a group of state income maintenance workers who were blind requested several accommodations, including the use of readers, braille forms and a computer which stores and retrieves information in braile. Although the costs of these accommodations were substantial, the court found that the additional dollar burden was only a small fraction of the state agency's personnel budget. Given these facts, the accommodations would not require "significant expense" and thus would not be an undue hardship. However, the same accommodations may be an undue hardship for a small employer because they would require expending significant proportions of available resources.

The fourth factor for determining or not an accommodation would impose an undue hardship focuses on the type of operation maintained by the entity. This would include, for example, consideration of the special circumstances incurred on certain types of temporary worksites common in the construction industry. For example, in some circumstances, it might fundamentally alter the nature of a construction site or be unduly costly to implement or maintain physical accessibility, for a job applicant or employee who

[30] 567 F. Supp. 369 (E.D. Pa. 1983).

uses a wheelchair if, for example, the site's terrain and the building structure changes daily as construction progresses. The Committee recognizes that some accommodations that can easily be made in an office setting may impose an undue hardship in other settings.

The determination of undue hardship is a factual one which must be made on a case-by-case basis. Like Section 504 of the Rehabilitation Act, the burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship.[31]

Section 102(b)(6)—Qualification standards

This section prohibits the use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out persons with disabilities, unless the criteria are shown to be jobrelated and consistent with business necessity.

If an employer uses a facially neutral qualification standard, employment test or other selection criterion that has a discriminatory effect on persons with disabilities, this practice would be discriminatory unless the employer can demonstrate that it is jobrelated and required by business necessity.[32]

The requirement that job selection procedures be job-related and consistent with business necessity underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the job, but that even if they do provide such a measure, a disabled applicant is offered a reasonable accommodation to meet the criteria that relate to the essential functions of the job at issue. It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant.

Section 102(b)(7)—Tests

Tests should measure what they purport to measure. It is discriminatory to select and administer tests to a person who has a disability that impairs sensory, manual, or speaking skills, if the test reflects impaired sensory, manual or speaking skills, rather than reflecting the skills or aptitudes the test purports to measure. An employer can use such a test if the test purports to measure sensory, manual, or speaking skills and those skills are related to the job, as required under this title.

Section 102(c)—Medical examinations and inquiries

Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities, particularly those with "hidden" disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer, before their ability to perform the job was even evaluated.

In order to assure that misconceptions do not bias the employment selection process, this section sets up a process that begins

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[31] *Prewitt* v *U.S. Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981), 29 CFR 1613.704(a).

[32] *See, Prewitt* v. *U.S. Postal Service*, 662 F.2d 292, 306 (5th Cir., 1981), 45 CFR 84.13; 28 CFR 42.512; 29 CFR 32.14; 42 Fed Reg. 22688, ¶ 17 (1977).

with the prohibition of pre-employment medical examinations or inquiries. This process parallels the requirements in the regulations implementing Section 504 of the Rehabilitation Act of 1973, but differs from requirements under Section 503 of the same Act.

Before employment.—Employers may not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is disabled or as to the nature of severity of a disability. An employer may make inquiry into the ability of an applicant to perform job-related functions.

After an offer of employment has been made, an employer may require a medical examination, and may condition the offer of employment on the results of the examination. All entering employees within the same job category must be subject to the examination, however, and information obtained during the examination must be kept confidential. This information, including the medical condition or history of the applicant, must be collected and maintained on separate forms and kept in separate files from general personnel information.

This confidential information may be shared with supervisors and managers regarding necessary restrictions on the work of the employee and necessary accommodations. It may also be shared with first aid and safety personnel for emergency purposes and with government officials investigating compliance with the Act.

The results of the medical examination cannot be used to discriminate against a person with a disability if the person is still qualified for the job.

In certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet the employer's criteria for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

The Committee does not intend for this Act to override any legitimate medical standards or requirements established by federal, state or local law, or by employers for applicants for safety or security sensitive positions, if the medical standards are consistent with this Act.

During employment.—After an employee is hired, an employer cannot require a medical examination, make an inquiry as to whether the employee has a disability, or inquire as to the nature or severity of the disability, unless the examination or inquiry is job-related and consistent with business necessity.

An employer may conduct voluntary medical examinations which are part of an employee health program available to employees at a particular worksite. This provision was included in the bill to allow the continuation of voluntary "corporate wellness" programs. These voluntary corporate wellness programs have over the years uncovered employees with elevated blood pressure readings, glaucoma, lung cancer and other ailments for which the employee can then seek medical help. These programs can also be used, and

are used, to provide treating physicians with x-ray and lab tests which help reduce the cost for medical care. This section does not preclude employers from continuing to offer these programs on a volunary basis. Employers may not require, however, medical examinations which are not job-related and consistent with business necessity.

As during pre-employment, employers may continue to make inquiries into the ability of an employee to perform job-related functions. These examinations and inquiries are subject to the same confidentiality and non-discrimination requirements as for pre-employment examinations and inquiries.

An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless the testing is job-related. While the employer may argue that it does not intend to penalize the person, the person with cancer may object merely to being identified, independent of the consequences. Being identified as having a disability often carriers both blatant and subtle stigma. Legitimate needs of the employer are met by allowing job-related examinations and inquiries.

Consistent with regulations implementing the Rehabilitation Act, covered entities may invite applicants to indicate whether and to what degree they have a disability only under the following circumstances:

when a covered entity is taking remedial action to correct the effects of past discrimination,

when a covered entity is taking voluntary action to overcome the effects of conditions that resulted in limited employment opportunities for persons with disabilities, or

when a covered entity is taking affirmative action required by Section 503 of the Rehabilitation Act of 1973.

If a covered entity meets any of these circumstances, then it must state clearly on any written questionnaire used for this purpose or make clear orally (if no written questionnaire is used):

that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts, and

that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide the information will not subject the applicant or employee to any adverse treatment, and that the information will be used only in accordance with this title.

Section 103. Defenses

Section 103(a)—In general

If a qualification standard, test, or other selection criterion screens out or tends to screen out or otherwise denies a job to an individual with a disability, an employer may defend the practice by showing that the practice is job-related and consistent with business necessity.

Section 103(b)—Qualification standards

Employers, as discussed above, may set qualification standards for their employees. For example, an employer may have a requirement that a person be able to lift 50 pounds or be able to drive a vehicle, if these requirements are job-related and consistent with business necessity.

A qualification standard may also include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. During Committee consideration, this "direct threat" standard was extended to all individuals with disabilities, and not simply to those with contagious diseases or infections.

This concept is also contained in the Civil Rights Restoration Act of 1988 [33] and the Fair Housing Amendments Act.[34] It is based on the same standard for "qualified" person with a disability that has existed for years under the Rehabilitation Act of 1973.

In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in *School Board of Nassau County* v. *Arline.*[35] In *Arline,* the court held that a "person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." [36] Such risk of transmitting the infection to others must be determined based on objective and accepted public health guidelines.

An amendment defining "direct threat" was adopted by the Committee in Section 101(8). Direct threat is defined as a "significant risk to the health or safety of others that cannot be eliminated with reasonable accommodation." This definition was added to clarify that the direct threat standard is a codification of the analysis in *Arline.*

While the *Arline* case involved a contagious disease, tuberculosis, the reasoning in that case is applicable to other circumstances. A person with a disability must not be excluded, or found to be unqualified, based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others. Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case.

For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others. This would be an assumption based on fear and stereotype. The purpose of creating the "direct threat" standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent

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[33] P.O. 100-259, 29 U.S.C. 706(8)(C).
[34] P.L. 100-430, 42 U.S.C. 3604(f)(9).
[35] 480 U.S.C. 273 (1987).
[36] 480 U.S. at 287, n.16.

history of committing overt acts or making threats which caused harm or which directly threatened harm.[37]

The "direct threat" standard may not be used to circumvent the prohibition against pre-employment inquiries into a person's disability. It may not be used to justify generalized requests or inquiries related to medical records. The prohibition against pre-offer medical examinations also applies to psychological examinations.

The employer may, however, conduct a post-offer medical examination, including a psychological examination, as long as it meets the requirements of Section 102(c)(3). If the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the workplace.

The plaintiff is not required to prove that he or she poses no risk. As stated in *Chalk* v. *U.S. District Court,* "[l]ittle in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an employee only if there is 'a *significant* risk . . . to others'." [38]

The determination of significant risk for persons with disabilities must be based on the current condition of the applicant or employee. The decision to exclude cannot be based on merely "an elevated risk of injury." [39] This amendment adopted by the Committee sets a clear, defined standard which requires actual proof of significant risk to others.

Section 103(c)—Religious entities

This section states that the ADA does not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such entity. This provision is similar to provisions included in Section 702 of the Civil Rights Act of 1964,[40] and should be interpreted in a consistent manner. Nothing in this section should be interpreted to affect Section 702 of the Civil Rights Act of 1964.

This section also allows religious organizations to require that all applicants and employees conform to the religious tenets of such organizations. A similar provision is included in title IX of the Educational Amendments of 1972.[41] The Committee intends that this provision be interpreted consistent with that provision. To the extent allowed under title IX, religious tenets are not required to be in written form to be considered under this section.

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[37] For example, an employer may not refuse to hire an individual simply because the applicant has mental retardation or has sought treatment for a mental disorder. Similarly, if the employer determines that the applicant has a history of mental illness, the employer cannot presume that the person poses a threat to the health or safety of others. Any determination of direct threat must be based on objective evidence, not stereotype or speculation.

[38] 840 F.2d 701, 707 (9th Cir. 1988), emphasis original, quoting *Arline* (see fn. 36).

[39] *See, Mantolete* v. *Bolger,* 767 F.2d 1416, 1422 (9th Cir., 1985).

[40] 42 U.S.C. 2000e–1.

[41] 20 U.S.C. 1681(a)(3).

Section 104. Illegal use of drugs and alcohol

Employers are not prohibited from discriminating against a person based on current illegal use of drugs. However, a person who illegally uses drugs, but is discriminated against because of some other disability that is covered under the Act, is still protected againt such discrimination. The person is simply not protected against adverse actions taken on the basis of such person's illegal use of drugs.

Section 104(b) provides protections for persons who are not currently illegally using drugs and (1) have successfully completed a drug rehabilitation program, (2) are participating in a supervised rehabilitation program, or (3) are erroneously regarded as being an illegal user of drugs.

Sections 104 (a) and (b) are similar to sections 510 (a) and (b) relating to the entire bill, and should be interpreted in a consistent fashion.

Employers may require that employees not be under the influence of illegal drugs and may prohibit the use of alcohol or illegal drugs at the workplace. Employers may require that employees behave in conformance with requirements of the Drug-Free Workplace Act of 1988,[42] and may hold an employee who is an illegal user of drugs or an alcoholic to the same qualification standards required of all employees. Employers may require employees in sensitive positions, as defined by regulations established by the Departments of Transportation and Defense, and the Nuclear Regulatory Commission, to adhere to standards established by such regulations.

Finally, section 104(b) and section 104(d) explicitly allow employers to conduct drug tests for the illegal use of drugs to ensure that an applicant or employee is not illegally using drugs. However, the Committee wishes to emphasize that this provision may not be applied to conflict with the right of individuals who are legally taking drugs (e.g., taking drugs under medical supervision for their disability) not to disclose their medical condition before a conditional offer of employment has been given.[43] Thus, employers must either give drug tests after conditional offers of employment have been made (the employer may then make the job offer strictly contingent on the person not testing positive on the drug test for the illegal use of drugs) or ensure that any drug test given before a conditional job offer will be used to test strictly for the illegal use of drugs and not for drugs that are taken legally pursuant to medical supervision.

Section 105. Posting notices

Section 105 requires covered entities to post notices in an accessible format to applicants, employees, and members of the public describing the applicable provisions of the Act, in a manner prescribed in Section 711 of the Civil Rights Act of 1964.[44]

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[42] 41 U.S.C. 701, *et seq.*
[43] See Section 102(c)(2).
[44] 42 U.S.C. 2000-10.

Section 106. Regulations

The Equal Employment Opportunity Commission (EEOC) is required to issue regulations within 1 year after enactment. The regulations must be in an accessible format, and must be promulgated in accordance with the Administrative Procedure Act.[45]

In the employment title, as in all the titles, the Committee expects that the designated agencies will take their responsibilities seriously and will issue the required regulations in the designated time-frame. As noted, one of the stated purposes of this Act is "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities."[46] The first role that the federal agencies must play in enforcing the ADA is the issuance of regulations. The Committee intends that individuals with disabilities have a right under this Act to require the relevant agencies to issue the mandated regulations.

Section 107. Enforcement

Title I incorporated the powers, remedies and procedures set forth in Sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964.[47] The Committee intends that the powers, remedies and procedures available to persons discriminated against based on disability shall be the same as, and parallel to, the powers, remedies and procedures available to persons discriminated against based on race, color, religion, sex or national origin. Thus, if the powers, remedies and procedures change in title VII of the 1964 Act, they will change identically under the ADA for persons with disabilities.

A bill is currently pending in the Judiciary and Education and Labor Committees, H.R. 4000, which would amend the powers, remedies and procedures of title VII of the Civil Rights Act of 1964. Because of the cross-reference to title VII in Section 107, any amendments to title VII that may be made in H.R. 4000 or in any other bill would be fully applicable to the ADA. An amendment was offered, during consideration of H.R. 2273 by the Committee, that would have removed the cross-reference to title VII and would have substituted the actual words of the cross-referenced sections. This amendment was an attempt to freeze the current title VII remedies (*i.e.*, equitable relief, including injunctions and back pay) in the ADA. This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women. By retaining the cross-reference to title VII, the Committee's intent is that the remedies of title VII, currently and as amended in the future, will be applicable to persons with disabilities.

The Committee also addressed the concern that the statutory language providing that the remedies and procedures set forth in title VII of the Civil Rights Act of 1964 "shall be available" might have been interpreted to imply that a plaintiff could bypass the administrative remedies of title VII and go directly to court under

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[45] 5 U.S.C. 551 *et seq.*
[46] Section 2(b)(3).
[47] 42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9.

title I of the ADA.[48] Thus an amendment was adopted that replaced the term "available, with respect" with "the powers, remedies and procedures this title provides." The purpose of this amendment was to clarify that persons with disabilities must follow the same procedures and secure the same remedies as women and minorities under title VII, currently and as amended in the future. The Committee adopted this amendment because it reaffirms the intent of parity between people with disabilities and minorities and women under title VII, and because it serves to clarify the intended meaning of the provision. The amendment does not affect in any way the continued availability of the rights, remedies and procedures of other federal laws and other state laws (including state common law) as provided in Section 501(b) of this Act, but simply clarifies that the remedies of title VII of the Civil Rights Act of 1964 are the only remedies that are provided by title I of this Act for employment discrimination claims.

Administrative complaints filed under this title and the Rehabilitation Act should be dealt with in a manner to avoid duplication of efforts, and to prevent inconsistent or conflicting standards. The Committee intends that agencies with enforcement authority under this title or the Rehabilitation Act of 1973 should develop procedures and coordination mechanisms to achieve these goals. Coordinating mechanisms should be established in regulations or memoranda of understanding.

The term "person" is used in the enforcement section to make it clear that organizations representing individuals with disabilities shall have standing to sue under the ADA.

Section 108. Effective date

Title I becomes effective 24 months after enactment.

TITLE II—PUBLIC SERVICES

Section 201. Definition

This section defines the term "qualified individual with a disability." This definition is derived from the regulations implementing Section 504 of the Rehabilitation Act of 1973,[49] and should be interpreted in a manner consistent with those regulations.

Section 202. Discrimination

Title II extends the protections of Section 504 of the Rehabilitation Act to cover all programs of state or local governments, regardless of the receipt of federal financial assistance. By prohibiting discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance, Section 504 of the Rehabilitation Act has served not only to open up public services and programs to people with disabilities but has also been used to end segregation. The purpose of title II is to continue to break down barriers to the inte-

[48] The concerns expressed was that the term "shall be available" could be read to mean that the powers, remedies and procedures were merely available to a plaintiff, and that a plaintiff could choose not to avail him or her self of such powers, remedies and procedures.

[49] 45 CFR 84.3(k).

grated participation of people with disabilities in all aspects of community life. The Committee intends that title II work in the same manner as Section 504.

While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.[50] The general prohibitions set forth in the Section 504 regulations,[51] are applicable to all programs and activities in title II. The specific sections on employment and program access in existing facilities are subject to the "undue hardship" and "undue burden" provisions of the regulations which are incorporated in Section 204. No other limitation should be implied in other areas.

As with Section 504 of the Rehabilitation Act, integrated services are essential to accomplishing the purposes of title II. As stated by Judge Mansmann in *ADAPT* v. *Skinner*,[52] "the goal [is to] eradicat[e] the 'invisibility of the handicapped'." Separate-but-equal services do not accomplish this central goal and should be rejected.

The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title. Nor is the fact that the separate service is equal to or better than the service offered to others sufficient justification for involuntary different treatment for persons with disabilities. While Section 504 of the Rehabilitation Act and this title do not prohibit the existence of all separate services which are designed to provide a benefit for persons with disabilities, such as specialized recreation programs, the existence of such programs can never be used as a basis to exclude a person with a disability from a program that is offered to persons without disabilities, or to refuse to provide an accommodation in a regular setting.[53]

In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training.

In the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation" that does not constitute an "undue hardship."

The provision of reasonable accommodation is central to the non-discrimination mandate. Courts have recognized that the Rehabili-

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[50] Cases which have enforced the rights of persons with disabilities to accessible public services have recognized that Section 504 may place substantial burdens on state and local agencies in order to accomplish the goals of non-discrimination and integration. *See, e.g. Dopico* v. *Goldschmidt*, 687 F.2d 644, 650 (2d Cir., 1982); *New Mexico Association for Retarded Citizens* v. *New Mexico*, 678 F.2d 847, 855 (10th Cir., 1982).

[51] 45 CFR 84.4.

[52] 881 F.2d 1184, 1204 (3rd Cir. 1989) (*en banc*) (concurring in part and dissenting in part).

[53] *See*, 45 CFR 84.4(b)(3).

tation Act "mandates significant accommodation for the capabilities and conditions of the handicapped," [54] Which may require "substantial amounts of time and money to keep handicapped employees on the payroll," [55] Likwise, in *Nelson* v. *Thornburgh,* [56] the court recognized that while the cost of providing readers to blind caseworkers was substantial in the abstract, it was only a small part of the overall budget of the state agency and was slight compared to the societal consequences of unemployment of the blind workers.

In determining whether an accommodation would constitute an undue hardship, a number of factors, including the size and budget of the employer are set forth as factors to be considered. As stated in the appendix accompanying the Rehabilitation Act Section 504 regulations in 1977,

> Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to improve that requirement on a provider of foster home care services.[57]

This approach is applicable to title II as well. Thus, the undue hardship determination is flexible, depending on the facts of an individual case. The employer must demonstrate that a reasonable accommodation would impose an undue hardship.

Similarly, title II incorporates the regulations applicable to federally conducted activities under Section 504 with respect to program accessibility, existing facilities and communications,[58] which requires that the agency demonstrate that access cannot be accomplished without imposing an undue burden after considering all available resources. The agency must still take any action that would not result in a fundamental alteration to the program or an undue burden, "but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity."[59]

Title II should be read to incorporate provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973, such as Section 102(b)(4) of the ADA. However, nothing in the other titles should be construed to lessen the standards in the Rehabilitation Act regulations which are incorporated by reference in Section 204.

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[54] *Bentivegna* v. *Dept. of Labor,* 694 F. 2d 619, 621 (9th Cir. 1982).
[55] *Rhone* v. *U.S. Dept. of Army,* 665 F. Supp. 734, 745, n. 19 (E.D.Mo., 1987).
[56] 567 F. Supp. 369 (E.D.Pa. 1983).
[57] 42 Fed. Reg. 22688, May 4, 1977.
[58] 28 CFR Part 39.
[59] 28 CFR 39.150(a)(2).

Section 203. Actions applicable to public transportation provided by public entities considered discriminatory

This section prohibits discrimination in public transportation provided by public entities. These requirements were extensively addressed by the Committees with jurisdiction over transportation issues.

Section 204. Regulations

The Attorney General is require to issue regulations within 1 year after enactment. The regulations must be consistent with this title and the coordination regulations under the Rehabilitation Act of 1973, except with respect to "program accessibility, existing facilities" and "communications." For these provisions, such regulations must be consistent with the regulations applicable to federally conducted activities under Section 504 of the Rehabilitation Act.

Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.[60] The Committee intends that the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations.

The Secretary of Transportation is required to issue regulations for requirements under Section 203. The regulations must be in an accessible format, and must be promulgated in accordance with the Administrative Procedure Act.

Section 205. Enforcement

Section 205 incorporates the remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973.[61] As in title I, the Committee adopted an amendment to delete the term "shall be available" in order to clarify that Rehabilitation Act remedies are the only remedies which title II provides for violations of title II. The Rehabilitation Act provides a private right of action, with a full panoply of remedies available, as well as attorney's fees.[62]

This enforcement provision, like the others in the ADA, should be read in conjunction with Section 501(b), which provides that the ADA does not preempt other applicable laws that include equal or greater protection. For title II, like Section 504 of the Rehabilitation Act, this includes remedies available under 42 U.S.C. 1983 and under state law claims.[63]

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[60] The Act requires that regulations promulgated by the Attorney General shall be consistent with the coordination regulations codified at 28 CFR Part 41, as in existence on January 13, 1978. The portion of the 1978 regulation which dealt with design, construction and alteration used the American National Standards Institute (ANSI) specifications: later notices have substituted the Uniform Federal Accessibility Standards (UFAS) for the ANSI reference. The Committee does not intend that the Attorney General use the old ANSI standard from the 1978 regulation.

[61] 29 U.S.C. 794a.

[62] *See, e.g., Miener* v. *State of Missouri*, 673 F. 2d 969 (8th Cir. 1982).

[63] See discussion of Section 501(b), below.

Section 206. Effective date

Title II becomes effective 18 months after enactment. Requirements for fixed route vehicles under Section 203 become effective upon enactment.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Section 301. Definitions

This section provides definitions for the terms "commerce," "commercial facilities," "public accommodations," "public transportation," and "readily achievable."

Section 301(1)—Commerce

Commerce is defined in the same manner as in title II of the Civil Rights Act of 1964, regarding public accommodations.

Section 301(2)—Commercial facilities

Commercial facilities is a term used in Section 303 to address requirements for new construction and alterations. It is designed to cover nonresidential facilities that are not public accommodations and whose operations will affect commerce. For example, office buildings that are not public accommodations [*i.e.* do not contain entities listed in Section 301(3)], factories and warehouses, would be commercial facilities and thus are subject to the requirements of Section 303.

The term "commercial facilities" does not include entities that are covered or expressly exempted under the Fair Housing Act. Entities covered under the Fair Housing Act are already under an obligation not to discriminate against persons with disabilities.

The obligations imposed by Section 303 for new construction and alterations are the same for public accommodations and for commercial facilities.

The term "commercial facilities" replaces the term "potential places of employment" in H.R. 2273 as introduced. This change was made to eliminate confusion over the obligations under this title and title I concerning employment. The Committee intends that obligations under each title be separate and distinct.

With this change, the Committee does not intend to restrict the scope of the term "commercial facilities," which retains the same definition that "potential places of employment" has in S. 933, as enacted by the Senate. The term is not intended to be defined by a dictionary or common industry definition. Rather, the definition of "commercial facility" is any facility that is intended for nonresidential use and whose operations will affect commerce.

Section 301(3)—Public accommodation

The definition of public accommodation differs from the bill as introduced. The bill as introduced provided a standard to be applied, rather than a list of covered accommodations. The new definition lists 12 categories of public accommodation.

The bill, as reported, provides examples of public accommodations, based on the following categories:

1. Places of lodging
2. Establishments serving food or drink
3. Places of exhibition or entertainment
4. Places of public gathering
5. Establishments selling or renting items
6. Establishments providing services
7. Stations used for public transportation
8. Places of public display or collection
9. Places of recreation
10. Places of education
11. Establishments providing social services
12. Places of exercise or recreation

These 12 listed categories are exhaustive. However, within each category, the bill lists only a number of examples. For example, under category (5), the bill lists "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." This list is only a representative sample of the types of entities covered under this category. Other retail or wholesale establishments selling or renting items, such as a book store, videotape rental store, or pet store, would be a public accommodation under this category.

A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public.

Entities not falling under one of these categories, or not privately operated, or not affecting commerce, are not considered to be public accommodations. Entities that are not public accommodations may be commercial facilities and subject to the requirements of Section 303. Entities operated by governments are not covered by this title, but are covered by other titles of this bill or other federal laws. The fact that a private entity receives funds from federal, state, or local governments would not remove it from coverage under this title.

Both the public accommodation facility and the programs and services offered by the public accommodation cannot discriminate against individuals with disabilities. As discussed below, there is an obligation not to discriminate in programs and services provided by the public accommodation, to remove barriers in existing facilities, and to make new and altered facilities accessible and usable. It is not sufficient to only make facilities accessible and usable; this title prohibits, as well, discrimination in the provision of programs and activities conducted by the public accommodation.

Section 301(5)—Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense.

Unlike many other terms used in this bill, this is a new term that was not part of earlier civil rights laws, such as the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or their implementing regulations.

The definition provides factors to be considered in making a determination of what is readily achievable in a particular case. Factors include the size of both the overall business and the site involved in making the determination. This analysis is the same as in title I, when considering whether a reasonable accommodation in the employment context will impose an undue hardship. The same factors adopted during Committee consideration of the bill for "undue hardship" were adopted for "readily achievable."

In adopting this amendment, the Committee has responded to concerns about public accommodations that operate in depressed or rural areas that may be operating at the margin or at a loss. Specifically, concern was expressed that a business may elect to close a site if it is losing money rather than undertake significant investments to remove barriers to allow access and use for persons with disabilities.

The Committee does not intend for the requirements of the Act to result in the closure of neighborhood stores or in the loss of jobs. Rather, the Committee intends for courts to consider as a factor in determining whether removing a barrier is "readily achievable" whether the local store is threatened with closure by the parent company or is faced with job loss as a result of the requirements of this Act.

Section 302. Prohibition of discrimination by public accommodations

Section 302(a)—General rule

As a general rule, this section prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.

Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

The Committee adopted an amendment which clarifies that the prohibition against discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," applies to "any person who owns, leases (or leases to), or operates a place of public accommodation."

This amendment makes it clear that the owner of the building which houses the public accommodation, as well as the owner or operator of the public accommodation itself, has obligations under this Act. For example, if an office building contains a doctor's office, both the owner of the building and the doctor's office are required to make readily achievable alterations. It simply makes no practical sense to require the individual public accommodation, a doctor's office for example, to make readily achievable changes to

the public accommodation without requiring the owner to make readily achievable changes to the primary entrance to the building.

Similarly, a doorman or guard to an office building containing public accommodations would be required, if requested, to show a person who is blind to the elevator or to write a note to a person who is deaf regarding the floor number of a particular office.

The amendment also clarifies that the owner of a public accommodation is liable for discriminatory policies. For example, if the corporate headquarters for a chain of restaurants designs all new restaurants to contain barriers to access, an injunction could be brought against the corporation to enjoin the inaccessible new construction.

The amendment also clarifies that entities which lease public accommodations are covered by the requirements of this title.

Section 302(b)(1)—General prohibitions

Section 302(b)(1) sets out general prohibitions against discrimination. These prohibitions are further refined by the specific prohibitions in Section 302(b)(2)

Section 302(b)(1)(A)—Activities

Deny participation.—It is discriminatory to deny a person with a disability the right to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of the public accommodation.

The Committee emphasizes that a public accommodation may not exclude persons with disabilities for reasons other than those specifically set forth in this title ("direct threat" and eligibility criteria that are necessary to the operation of the business, see discussion below). For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities. This is a frequent basis of exclusion from a variety of community activities and is prohibited by this title.

Unequal benefit.—This title, like Section 504 of the Rehabilitation Act, prohibits services or accommodations which are not equal to those provided others. For example, person with disabilities must not be limited to certain performances at a theater.

Separate benefit.—Separate benefits or services are allowed only when necessary to provide persons with disabilities opportunities as effective as those provided others. Thus, this title would not prohibit the designation of restrooms or parking spaces for persons with disabilities.

Section 302(b)(1)(B)—Integrated settings

Integration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate.

For example, it would also be a violation of this Act to segregate seating for persons using wheelchairs to the back of auditoriums or

theaters. In addition to providing inferior seating, the patron in a wheelchair may be forced to separate from family or friends during a performance.

At times segregated seating is simply the result of thoughtlessness and indifference. At other times, safety concerns are raised, such as requiring patrons to sit near theater exits because of perceived hazards in case of fire. The purported safety hazard is largely based on inaccurate assumptions and myths about the ability of people with disabilities to get around in such circumstances. People who use wheelchairs vary greatly, as does the general public, in their individual ability to move quickly or slowly.

A balance between the safety interest and the need to preserve a choice of seating for movie patrons who use wheelchairs has already been accomplished under existing federal accessibility standards that have applied since 1984 to theaters, auditoriums and other places of assembly constructed with federal funds. These standards provide that wheelchair seating areas must be "dispersed throughout the seating area" and "located to provide lines of sight comparable to those for all viewing areas." Wheelchair areas are not restricted to areas near an exit, but can be located in various parts of the theater so long as they "adjoin an accessible route that also serves as a means of egress in case of emergency." [64]

The availability of a choice of seating is critical to assure that patrons with disabilities are not segregated from family or friends. New construction must provide a variety of seating options. In existing theaters, efforts should be made to increase seating options where readily achievable. If removal of seats is not readily achievable, the theater must, at a minimum, modify rules and procedures to allow a non-disabled companion to sit with a person who uses a wheelchair, by providing, for example, a folding chair. Seating should also be available in the front of the audience for persons with hearing and vision impairments, including those who use wheelchairs.

Section 302(b)(1)(C)—Opportunity to participate

It is critical that the existence of separate specialized services never be used as a justification for exclusion from programs that are not separate or different. For example, the existence of a special art program for persons who are developmentally disabled must not be used as a reason to reject an individual who is retarded from the regular art class if that person prefers to participate in that class. This provision does not require changes in the regular method of instruction that are not required under Sections 302(b)(2)(A)(ii) and (iii).

Section 302(b)(1)(D)—Administrative methods

Standards, criteria or administrative methods that have the effect of or perpetuate discrimination are also prohibited. (See discussion of 302(b)(2)(A)(i) below.)

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[64] Section 4.33.3, Uniform Federal Accessibility Standards.

Section 302(b)(1)(E)—Association

It is also illegal to discriminate against an individual or entity based on a relationship or association of the individual or entity with a disabled person. The term "entity" is included in this section because, at times entities that provide services to, or are otherwise associated with persons with disabilities, are subjected to discrimination. This protection is analogous to the protection provided in Section 102(b)(4) in the employment context.

Section 302(b)(2)—Specific prohibitions

Section 302(b)(2) sets out specific prohibitions. The general prohibitions set forth in Section 302(b)(1) are patterned after provisions contained in other civil rights laws protecting women and minorities. In order to provide effective protections for persons with disabilities, however, additional specific prohibitions are provided in this section. These specific provisions, including the limitations contained within them, control over the general provision to the extent that is any conflict.

Section 302(b)(2)(A)(i)—Eligibility Criteria

It is discriminatory to impose eligibility criteria that screen out or tend to screen out disabled persons from public accommodations, unless the eligibility criteria can be shown by the public accommodation to be necessary to provide persons with disabilities the goods or services of that public accommodation.

For example, it would be illegal to require all customers to present a driver's license in order to purchase merchandise, because this would screen out persons with disabilities who do not drive. It would not be discriminatory to require another equally valid form of identification that did not screen out persons with disabilities.

Under this provision, it would be a violation for a store to impose a rule that no blind or deaf person would be allowed in the store. Further, it would be a violation for such an establishment to invade such individuals' privacy by trying to identify unnecessarily the existence of a disability—for example, by asking whether a person has a disability, by forcing the person to disclose medical records, or by requiring the person to undergo an exam or to determine whether the person has a disability.

A public accommodation may, however, impose neutral rules and criteria that are necessary for the safe operation of its business. For example, a height limitation for certain rides in an amusement park may screen out certain persons with disabilities of short stature, but may still be a legitimate safe criterion. Similarly, it may be a legitimate safety requirement that persons be able to see in order to operate certain devices or vehicles, even though the effect of this requirement is to deny access only to those persons with visual impairments. Safety criteria must, however, be based on actual risks and not on speculation, stereotypes or generalizations about persons with disabilities.

Section 302(b)(2)(A)(ii)—Reasonable modifications

It is discriminatory to fail to make reasonable modifications in policies and practices when such modifications are necessary to provide goods or services, unless it can be demonstrated that the modifications would fundamentally alter the nature of the goods or services provided.

For example, it is discriminatory to refuse to alter a "no pets" rule for a person with a disability who uses a guide or service dog. It would not be a violation of this title to refuse to modify a policy of not touching delicate works of art for a person who is blind if the touching threatened the integrity of the work.

Section 302(b)(2)(A)(iii)—Auxiliary aids and services

It is discriminatory to fail to take steps to ensure that a disabled individual is not treated differently because of the absence of auxiliary aids and services, unless it can be demonstrated that the auxiliary aids would fundamentally alter the nature of the goods or services being offered, or would result in an undue burden.

For example, a store would be required to communicate with a person who is deaf by writing down information which is normally spoken (such as indicating the location of the furniture department). It may be an undue burden, however, for the store to provide an inerpreter to convey this information.

The term "undue burden" is analogous to the term "undue hardship" in title I. The determination of whether the provision of an auxiliary aid or service imposes an undue burden on a public accommodation will be made on a case-by-case basis, taking into account the same standard and factors used for determining an undue hardship.

A critical determination is what constitutes an effective auxiliary aid or service (or reasonable accommodation in the employment context). While the use of handwritten notes may be effective to a person who is deaf in the context of shopping, it may not be an effective means of communication in a training session for employees in the employment context. Likewise, while it may not be necessary to provide braille price tags for shoppers who are visually impaired, it may be necessary to provide braille manuals in the employment context. For this reason, the obligations of a business will vary depending on the context involved.

Open-captioning of feature films playing in movie theaters is not required by this Act. Filmmakers are encouraged, however, to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of captioned versions of feature films.

Sections 302(b)(2)(A)(iv)-(v) and 303—Obligations for existing facilities, alterations and new construction

One major obstacle for persons with disabilities is simply obtaining access into buildings. Buildings have often been constructed in such a manner that persons with disabilities are effectively excluded from such places—they cannot get through the door, get around and use the building, or go to another floor.

This title sets out accessibility standards for buildings containing public accommodations. Three situations are covered: existing facilities, alternations, and new construction.

This section reflects the balance between the need to provide access for persons with disabilities and the desire to impose limited cost on businesses. Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures—a standard of "readily achievable." Because it costs far less to incorporate accessible design into the planning and constructing of new buildings and of alterations, a higher standard of "readily accessible to and usable by" persons with disabilities has been adopted in the ADA for new construction and alterations.

The Fair House Amendments Act of 1988 adopted the same "readily accessible to and usable by" standard for common areas in newly constructed multi-family housing units.

"Readily achievable" vs. "readily accessible to and usable by"

The "readily achievable" and "readily accessible" standards are quite different. Readily achievable is defined as meaning an action which is easily accomplishable without much difficulty or expense. In making this determination, many factors are to be taken into consideration, including the overall size of the business, the site involved, and the nature and cost of the action needed. These are the same factors used when determining whether a reasonable accommodation imposes an undue hardship on an employer in title I.[65]

"Readily accessible to and usable by" is a higher standard, and has been used in a number of previous laws requiring accessibility. It is intended to enable persons with disabilities to get to, enter and use a facility. Although it does not mean total accessibility in every part of every area of a facility, it does mean a high degree of convenient accessibility: for example, accessible routes to and throughout a facility, accessible entrances to buildings and spaces, usable bathrooms, water fountains and other features.[66]

For example, many banks provide automatic teller machines (ATMs) for use of their customers. A bank with existing ATMs would have to remove barriers associated with the ATM if removal is readily achievable—easily accomplished without much difficulty or expense. Providing a small ramp to avoid a few steps may be readily achievable, but raising or lowering the ATM may be too difficult or expensive. If no readily achievable changes were possible, then the bank would have to provide service through alternative methods.

For new construction and alterations, the purpose is to ensure that the service offered to persons with disabilities is equal to the service offered to others. It would be a violation of this title to

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[65] As noted in the discussion of that title, the standard to be applied to these factors is significantly lower in determining whether an action is "readily achievable" than the standard used to determine whether a reasonable accommodation poses an undue hardship.

[66] Additionally, at supermarkets, for example, features erected to discourage the removal of shopping carts must meet established accessibility criteria for doors, including the required clearance, hardware, thresholds and operating pressure to allow for passage of persons with disabilities.

build a new bank with ATMs that were not readily accessible to and usable by persons with disabilities. It is not sufficient that the person with a disability can conduct business inside the bank. The ATMs provide an additional service which must be made available to persons with disabilities.

When identical features will generally be used in different ways once the new building is occupied, each one should be accessible in most situations. For example, in a convention center, each of the many identical meeting rooms should be accessible, because they will house meetings on different subjects when the buildings is in use. However, although each restroom in a new facility must be accessible, it is not necessary that every stall within the bathroom have access features.

Section 302(b)(2)(A)(iv)—Existing facilities

For existing facilities, it is discriminatory to fail to remove structural architectural and communications barriers, if such removal is readily achievable (i.e. easily accomplishable without much difficulty or expense). If it can be demonstrated that removal is not readily achievable, then goods or services must be provided through alternative methods, if such methods are readily achievable.

This readily achievable analysis must be done on a case by case basis. The Committee cannot give a blanket statement of what specific actions are readily achievable and thus required by this section. The readily achievable standard provides flexibility for public accommodations to remove barriers and provide access for persons with disabilities.

For example, questions were raised during the Subcommittee hearings concerning whether an existing retail store would have to raise, lower or remove its shelves to allow access. The obligation under this section is to remove barriers if such removal is readily achievable, that is, easily accomplishable without difficulty or expense. If it is not readily achievable, then the store must provide access through alternative methods, if the alternative methods are readily achievable.

Fixtures that pose barriers must be removed if doing so would be readily achievable. If removing a fixture means losing an insignificant amount of selling space, which would not be expensive or difficult, the fixture would have to be removed. By contrast, if removing the fixture would result in a significant loss of selling space, it would be difficult and expensive, and thus would not have to be removed.

The same principles apply to the question of whether aisles have to be widened for persons who use wheelchairs. Again, the test is whether the aisles would be readily achievable, that is, can it be done without difficulty or expense? If not, service must be provided in an alternative manner, if the alternative manner is readily achievable.

As another example, concerns were expressed regarding the use of temporary facilities brought to areas following natural disasters such as floods and tornados, to temporarily replace public accommodations. These temporary facilities must remove barriers if such removal is readily achievable. For example, if a pharmacy is temporarily operating in a trailer following a natural disaster, the

pharmacy must explore whether providing access to the trailer is readily achievable, *i.e.,* would providing access, by a temporary ramp, for example, be easily accomplishable and able to be carried out without much difficulty or expense).

Section 302(b)(2)(A)(v)—Alternative methods for existing facilities

If an entity can demonstrate that removal of a barrier is not readily achievable, then there is an obligation to make goods services available through alternative methods, if the alternative methods are readily achievable.

If, in the retail store example above, the store could demonstrate that raising, lowering, or removing shelves would not be readily achievable, then the store must consider providing access through alternative methods. For example, a clerk could retrieve merchandise from inaccessible shelves, unless this alternative method is not readily achievable.

In the pharmacy example above, if the pharmacy could demonstrate that removing the barrier is not readily achievable, then it must consider methods of providing it services through alternative methods. In this case, a clerk could meet a customer at the foot of the trailer stairs to take or deliver prescription orders. This would satisfy the alternative methods requirement.

Section 302(b)(3)—Specific construction

The Committee adopted an amendment adding this provision which states that nothing in this title requires an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommoditions of an entity where an individual poses a direct threat to the health or safety of others. The term "direct threat" is defined as posing a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary and services."

The Committee does not wish to imply, by the addition of this provision, that people with disabilities necessary pose risks to others. Rather, this provision was added simply to address any concerns that may arise in this area and to establish clearly the strict standard that must be met before denying services or goods to an individual with a disability based on the fear that such individual poses a risk to others. This provision is identical to one added in the employment section, and the discussion of this issue there applies here as well.

Section 303. New construction and alterations in public accommodations and commercial facilities

New construction and alterations of both public accommodations and commercial facilities must be made readily accessible to and usable by individuals with disabilities. The requirements for new construction applies to facilities for first occupancy 30 months after enactment.

As noted above, the requirement of "readily accessible to and usable by" individuals with disabilities contemplates a high degree of convenient accessibility. Essentially, it is designed to ensure that

patrons and employees of public accommodations and commercial facilities are able to get to, enter and use the facility.

For potential patrons, this means accessibility of parking areas, accessible routes to, from and into the facility, usable bathrooms and water fountains, and access to the goods, services, and programs of the facility. For example, a new building should be designed so that a potential patron can get to a store, get into the store, and get to the areas where goods are being provided.

For potential employees, the requirement of "readily accessible to and usable by" includes the same types of access, although such individuals require access to and around the employment area, rather than to the area where goods or services are being provided. For example, a new building should be designed so that a potential employee can get to the building, get into the building and get to and around the employment area. It is not required, however, that all individual workstations be constructed in a fully accessible manner, with, for example, accessible features such as lowered shelves and counters. Such modifications in a particular workstation would be instituted as a "reasonable accommodation" if a particular employee requires such modifications and if they did not constitute an undue hardship.[67]

The Committee adopted an amendment to move the section governing alterations for existing facilities from Section 302(b)(2)(vi), which only covered public accommodations, to Section 303 which covers both public accommodations and commercial facilities.

The rationale for making new construction accessible applies with equal force to alterations. The ADA is geared to the future—the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible. The provision governing alterations is akin to new construction because it is only applicable to situations where the commercial facility itself has chosen to alter the premises.

This provision does not require alterations. Rather it simply provides that, when alterations are being made, they must be done in a manner such that, to the maximum extent feasible, the altered area is readily accessible to and usable by individuals with disabilities. It simply makes no sense to alter premises in a manner that does not consider access. Moreover, if alterations were not included in Section 303, governing commercial facilities, the anomalous situation could arise of a new accessible building being renovated to include barriers to access. If a business is going to build a new building or engage in alterations, the access requirements apply.

Alterations that affect or could affect usability of a public accommodation or commercial facility must be done in such a manner that the altered portions of the facility are readily accessible to and

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[67] Of course, it is always less expensive to build something new in an accessible manner, the Committee expects that if it would not affect the usability or the enjoyment of the public accommodation by members of the general public, consideration should be given in new construction to placing fixtures and equipment at a convenient height for accessibility. In addition, if such items are commercially available, and it would not affect usability or enjoyment by the general public, an effort should be made to purchase new fixtures and equipment that are adjustable so that reasonable accommodations in the future will be less likely to pose undue hardships.

usable by persons with disabilities, to the maximum extent feasible. Minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability do not trigger the requirement that the altered areas must be made accessible or that the path of travel to the alteration, or the bathrooms and other facilities must be made accessible. Usability should be broadly defined to include renovations which affect the use of facility, and not simply changes which relate directly to access.

If an alteration is done to an area that contains a primary function, to the maximum extent feasible, the alteration, the path of travel to the alteration, and bathrooms, telephones and drinking fountains serving the remodeled area must be readily accessible to and usable by individuals with disabilities. Areas containing primary functions refer to those portions of a public accommodation where significant goods, services, facilities, privileges, advantages, or accommodations are provided. It is analogous to the concept in existing Uniform Federal Accessibility Standards of "the rooms or spaces in a building or facility that house the major activities." [68] A mechanical room, boiler room, supply storage room, or janitorial closet is not an area containing a primary function; the customer services lobby or a bank, the dining area of a cafeteria, the meeting rooms in a conference center, and the viewing galleries of a museum are areas containing a primary function.

These additional obligations for areas containing primary functions must not be disproportionate to the overall alterations in terms of cost and scope. This disproportionality concept recognizes that, in some circumstances, achieving an accessible path of travel and accessible restrooms, telephones, and drinking fountains may be sufficiently significant in terms of cost or scope in comparison to the remainder of the alteration being undertaken as to render this requirement unreasonable. For example, it would clearly be disproportionate to require a public accommodation to double the cost of a planned alteration. The Committee believes, however, that it would be consistent with the ADA for the minimum guldelines or regulations to establish a specific standard, such as 30% of the alteration costs, for determining the disproportionality of the accessible path of travel and related accessibility features required.

The parameters of the concept of disproportionality will be addressed in minimum guldelines issued by the Architectural and Transportation Barriers Compliance Board and established in the regulations promulgated by the Attorney General.

A public accommodation or commercial facility may not evade the path of travel, accessible restrooms, and other requirements by performing a series of small alterations which it would otherwise have performed as a single undertaking. For example, if a public accommodation has completed an alteration without incorporating an accessible path of travel, accessible restrooms, and other requirements, the total costs of the prior alterations plus others that are or will be proximate in time may be considered in determining

[68] Section 3 5, Uniform Federal Accessibility Standards.

whether providing an accessible path of travel, restrooms, telephones and bathrooms is disproportionate.

If the aggregate cost of an accessible path of travel, accessible restrooms, telephones, and drinking fountains would be disproportionate to the overall alteration cost, the public accommodation is not relieved of the obligation to provide a number of such features that are not disproportionate. The goal is to provide a maximum degree of accessibility in such features without exceeding the disproportionality limit.

If a selection must be made between accessibility features, those which provide the greatest use of the facility be selected. For example, an accessible entrance would generally be the most important path of travel features, since without it the facility will be totally unusable by many persons with disabilities. An accessible restroom would have greater priority than an accessible drinking fountain.

If there is no way to provide an accessible path of travel to an altered area because of the disproportionality limit, making restrooms, telephones and drinking fountains serving the area accessible is still required if it is not disproportionate. Some individuals with disabilities can negotiate steps but still need accessibility features in restrooms, drinking fountains, and telephones.

Elevators are not required in an alteration or new construction for facilities of fewer than 3 stories or that have less than 3000 square feet per story, unless the builidng is a shopping center or mall, a health care provider, or as determined by the Attorney General.

Section 306. Regulations

The Attorney General is required to issue regulations for this title, except for Sections 302(b)(2)(B) and (C), and Section 304. These other sections address transportation issues for which the Secretary of Transportation shall issue appropriate regulations.

The Attorney General is required to issue the regulation within 1 year after enactment. As with the other regulations required by this bill the regulations must be in an accessible format, and must be promulgated in accordance with the Administrative Procedure Act.[69]

These regulations should include standards for facilities and vehicles and such standards must be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (ATBCB) in accordance with Section 504 of this Act.

Until final regulations are issued, compliance with the Uniform Federal Accessibility Standards (UFAS) will satisfy the requirements that facilities be "readily accessible to and usable by persons with disabilities," for alterations and new construction under Section 303.

If the Attorney General has not issued final regulations within 1 year after the ATBCB has issued supplemental minimum guidelines as required under section 504(a), then compliance with the ATBCB supplemental guidelines is required to satisfy the "readily

[69] U.S.C. 551, *et seq.*

accessible" standard, until final regulations are issued by the Attorney General.

The Committee adopted an amendment to clarify the interim accessibility standards under the ADA. The standard was modified to link the interim accessibility standards to when a builder has obtained a permit for a building and will build the facility within the time specified in the permit. This amendment added to the existing language to give builders a time frame with which to work.

Section 307. Exemptions for private clubs and religious organizations

The section creates an exemption from this title for private clubs and religious organizations. The exemption for private clubs is intended to operate in the same narrow manner as in title II of the Civil Rights Act of 1964.[70]

The Committee does not intend to cover under this title religious organizations or entities controlled by religious organizations, including places of worship. Thus a church sanctuary would not be required to make its facilities accessible to and usable by disabled persons, nor to construct new facilities in such a manner.

In order to qualify for this exemption, the entity must be controlled by a religious organization, as that concept has been applied in other civil rights laws, such as in the exemption provided under title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act.[71]

Section 308. Enforcement

Private Right of Action.—Section 308 sets forth the enforcement procedures available under this title. Section 308(a)(1) incorporates by reference the remedies and procedures provided under Section 204(a) of title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations on account of race, color, religion or national origin. Thus, a private civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order or other order, is provided under this title. Section 204(a) of the 1964 Act also provides that the Attorney General may intervene in a suit brought by a private plaintiff.

As with other titles of the bill, the Committee intends that persons with disabilities have remedies and procedures parallel to those available under comparable civil rights laws. Thus, if the remedies and procedures change in title II of the 1964 Act, for persons discriminated against in public accommodations on account of race, color, religion, or national origin, they will change identically in this title for persons with disabilities.

Section 308(a)(2) makes clear that for violations of Section 302(b)(2)(A)(iv), regarding removing barriers in existing facilities, and Section 303(a), regarding making new construction and alterations readily accessible, injunctive relief shall include an order to make these facilities readily accessible, injunctive relief shall include an order to make these facilities readily accessible to and usable by persons with disabilities to the extent required by this

[70] 42 U.S.C. 2001a(e).
[71] 29 U.S.C. 1681(a)(3).

title. Also, where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

Enforcement by the Attorney General.—Section 308(b) sets out enforcement procedures by the Attorney General. The Attorney General has a three part obligation: (1) to investigate alleged violations of title III and to conduct periodic reviews of compliance, (2) to certify that state laws or local building codes meet or exceed requirements of the bill and (3) to bring cases that indicate a pattern or practice of discrimination or that are of general public importance.

The Attorney General is required to investigate alleged violations of this title, and to conduct periodic reviews to evaluate whether covered entities are complying with this title. This duty of the Attorney General is essential to effective enforcement of this title. The Committee expects that the Attorney General will engage in active enforcement and will allocate sufficient resources to carry out this responsibility.

The Attorney General is empowered to certify that state or local laws meet or exceed the minimum standards for accessibility established in title, on application of a state or local government. Before certification may be granted, the Attorney General must give notice of a public hearing, and at such hearing allow persons, including persons with disabilities, an opportunity to testify against the certification. Certification shall be rebuttable evidence that the state or local law meets or exceeds the minimum requirements of this Act.

If the Attorney General proposes to grant certification for a particular law, code, or ordinance, a notice shall be issued in the Federal Register. An informal hearing shall be held before an official of the Department of Justice (not an Administrative Law Judge), at which interested persons shall have an opportunity to express their views, and the Attorney General shall also consider written comments. Certification is not to be considered rulemaking for purposes of the Administrative Procedure Act. The Attorney General may establish priorities for considering certification (*e.g.*, priority could be given to state documents before local documents, or to those that incorporated acceptable model building codes). The Attorney General may also establish procedures for revoking certification and establish the circumstances in which such action would be appropriate.

The Attorney General may bring a civil action in an appropriate court if he or she has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title. In addition, the Attorney General may bring a case where any person or group of persons has been denied any of the rights granted by this title, if such denial raises an issue of general public importance.

Section 308(b)(2) sets forth the authority of the court in actions brought by the Attorney General. The court may grant equitable relief, including making auxiliary aids available and making facilities readily accessible to and usable by persons with disabilities.

The court also may award monetary damages to the person aggrieved, if it is requested by the Attorney General. The court does not have authority to award monetary damages in situations where such relief is not requested by the Attorney General. The Committee intends that monetary damages may include compensatory damages. Such damages are not limited to out-of-pocket expenses. Monetary damages do not include punitive damages, as specifically stated in Section 308(b)(4).

To vindicate the public interest, the court may assess a civil penalty against a violator. Civil penalties may not exceed $50,000 for a first violation, and $100,000 for a subsequent violation. The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not to be automatically imposed in every case. When making a determination regarding the amount of penalty, the court should consider the nature and circumstances of the violation, the degree of culpability, any history of price violations the financial circumstances of the violator, the goal of deterrence, and other matters as justice may require.

Section 308(b)(5) states that the court should also consider whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

Section 308(b)(3) provides that for purposes of determining whether a "first" or "subsequent" violation has occurred, a determination of liability in the same trial counts as a single violation. Thus, multiple violations of the Act, determined in a first trial, cannot trigger the imposition of a $100,000 civil penalty based on the "subsequent" violations provision.

Section 309. Examinations and courses

The Committee adopted an amendment which provides that any person who offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

The purpose of this amendment is to fill a gap which is created when licensing certification and other testing authorities are not covered by Section 504 of the Rehabilitation Act or title II of the ADA. Any such authority that is covered by Section 504, because of the receipt of federal money, or by title II, because it is a function of a state or local government, must make all of its programs accessible to persons with disabilities, which includes physical access as well as accommodations in the way the test is administered, *e.g.* extended time or assistance of a reader.

However, it is the Committee's belief that many licensing, certification and testing authorities are not covered by either Section 504 of the Rehabilitation Act, because no federal money is received, or by title II of the ADA, because they are not state agencies. However, states often require the licenses provided by such authorities in order for an individual to practice a particular profession or trade. Thus, this provision was adopted in order to assure that persons with disabilities are not foreclosed from educational, professional

or trade opportunities because an examination or course is conducted in an inaccessible site or without an accommodation.

Under this requirement an entity cannot offer its program in an inaccessible site without providing persons with disabilities an alternative accessible arrangement which provides comparable conditions to those provided to others. For example, the entity could not give a course or a test in an inaccessible classroom and then offer the person with the disability the test in a cold, poorly lit basement.

Section 310. Effective date

This title becomes effective 18 months after enactment.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

This title amends the Communications Act of 1934,[72] to make telecommunications services available to hearing and speech impaired persons. This title requires a national relay service to be established so persons with disabilities can communicate with other persons using telecommunications devices. These requirements were extensively addressed by the Committee with jurisdiction over communications issues.

TITLE V—MISCELLANEOUS PROVISIONS

Section 501. Construction

This section describes the relationship between the ADA and the Rehabilitation Act of 1973 and other laws. This section also describes the relationship between the ADA and insurance. Finally, the section provides an individual with a disability the right to decline a separate service or accommodation.

Under Section 501(a), nothing in the ADA is intended or should be construed to limit the scope of coverage or to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, or the regulations implementing that title. Thus, for example, the standards of title V of the Rehabilitation Act shall apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than Section 504 of the Rehabilitation Act.

In those instances where the ADA explicitly provides a different standard from Section 504 of the Rehabiliation Act, the ADA standard applies to the ADA, but not to Section 504. For example, Section 504 requires that all of the programs of a recipient of federal financial assistance be available to persons with disabilities. This may require major structural changes in existing facilities, if other means are ineffective in achieving program access. No financial limitation is imposed

By contrast, the ADA adopts a lower standard of access to public accommodations for existing buildings under title III. Access must be provided only if it can be provided in a manner that is "readily achievable," that is, if it can be easily accomplished without much difficulty or expense, under Section (301)(5)(A), in light of a number

[72] 47 U.S.C. 201 *et seq.*

of factors which are set forth in 301(5)(B). This is an instance in which the ADA provides a lesser standard than set forth in Section 504 of the Rehabilitation Act. This lesser standard applies only to the ADA and not to Section 504

Under Section 501(b) of the ADA, all of the rights, remedies and procedures that are available to people with disabilities under other federal laws, including Section 504 of the Rehabilitation Act, or other state laws (including state common law) are not preempted by this Act. This approach is consistent with that taken in other civil rights laws. The basic principle underlying this provision is that Congress does not intend to displace any of the rights or remedies provided by other federal or laws or other state laws (including state common law) which provide greater or equal protection to individuals with disabilities.

A plaintiff may choose to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, if the plaintiff's situation is protected under the alternative law and the remedies are greater. For example, the California Fair Enforcement and Housing Act (FEHA) does not cover persons with mental disabilities. However, the FEHA has been construed to provide compensatory and punitive damages. Because the ADA covers mental disabilities, the FEHA could be construed as not conferring equal or greater rights than the ADA. However, a person with a physical disability may choose to sue under the FEHA, as well as under the ADA, because of the availability of damages under the FEHA. Section 501(b) ensures that the FEHA is not preempted by the ADA.

Moreover, state tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a state tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the state tort claim in order to prevail under that cause of action.

Insurance.—Section 501(c) specifies that titles I, II, and III shall not be construed to restrict various insurance practices on the part of insurance companies aned employers, as long as such practices are not used to evade the purposes of this Act.

The Committee added this provision because it does not intend for the ADA to affect legitimate classification of risks in insurance plans in accordance with the state laws and regulations under which such plans are regulated. Further, the Committee does not intend to affect the preemption provision of the Employment Retirement Income Security Act (ERISA), which has been interpreted to exempt self-insured plans from state insurance regulation. In order to make this clear, the Committee has added Sections 501(c)(1)–(3).

Specifically, Section 501(c)(1) makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation.

Section 501(c)(2) recognizes the need for employers, and their agents, to establish and observe the terms of employee benefits plans, so long as these plans are based on legitimate underwriting or classification of risks.

Section 501(c)(3) provides that persons or organizations covered by the Act may continue to establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

Section 501(c)(3) is designed to clarify that self-insured plans, which are currently governed by the preemption provision of the Employment Retirement Income Security Act (ERISA), are still governed by that preemption provision and are not subject to state insurance laws. Concerns had been raised that Sections 501(c) (1) and (2) could be interpreted as affecting the preemption provision of ERISA. The Committee does not intend such an implication. Until the preemption provision of ERISA is modified, these self-insured plans are subject to state law only to the extent determined by the courts in their interpretatioun of ERISA's preemption provision. Of course, under the ADA, the provisions of these plans must conform with the requirements of ERISA, just as the provisions of other plans must be based on or not inconsistent with state law.

Section 501(c) may not, however, be used as a subterfuge to evade the requirements of this Act pertaining to employment, public services, and public accommodations regardless of the date an insurance or employer benefit plan was adopted.

For example, an employer could not deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of an anticipated increase in the costs of the insurance. Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan my not refuse to insure or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience.

For example, a blind person my not be denied coverage on blindness independent of actuarial classification. Likewise, with respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy but cannot be denied coverage for illness or injuries unrelated to the non-existing condition. And as noted above, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, coverage cannot be denied entirely to a perosn with a disability.

In sum, ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

Accommodations and services.—Section 501(d) provides that nothing in the ADA shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity or benefit which the individual chooses not to accept. The Committee added this section to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with dis-

ability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Section 502. Prohibition against retaliation and coercion.

Section 502(a) protects individuals from retaliation based on the exercise of rights under the ADA. Discrimination is prohibited against any individual who has opposed any act or practice made unlawful by the ADA. Discrimination is also prohibited against any individual who participates in the enforcement process.

Section 502(b) makes it illegal to coerce, intimidate, threaten or interfere with any individual who exercised, enjoyed, aided or encouraged rights granted under the ADA.

Section 502(c) provides the same remedies and procedures for victims of retaliation and coercion as in the underlying title. For example, an individual who was retaliated against in an employment discrimination complaint would have the same remedies and procedures available under Section 107 as an individual alleging employment discrimination.

Section 503. State Immunity

This section removes immunity of states granted by the Eleventh Amendment of the Constitution. The Committee intends for states to be covered by the ADA, where applicable, and to be subject to suit in federal or state courts. The remedies available against state defendants are the same as those available against other defendants.

This section was included to meet the requirements of *Atascadero State Hospital* v. *Scanlon.*[73]

Section 504. Regulations by the Architectural and Transportation Compliance Board

This section requires the ATBCB to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for accessible Design (MGRAD).[74]

Those supplemental guidelines are required to be issued within 9 months of enactment. The Committee lengthened the time period from 6 months to 9 months to accommodate the existing procedures for promulgation and review used by ATBCB.

These supplemental guidelines will establish requirements, in addition to those currently existing in MGRAD, to ensure that buildings, facilities, and vehicles are accessible to individuals with disabilities in conformance with the ADA. These guidelines should include scoping requirements. The guidelines will provide invaluable guidance to entities covered under titles II and III, as to the specific technical requirements in a myriad of situations.

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[73] 473 U.S. 234 (1985)
[74] 36 C.F.R. Part 1190.

Qualified Historic Properties

Section 504(c) requires the supplemental guidelines to incorporate standards already developed under the Uniform Federal Accessibility Standards (UFAS)[75] for qualified historic buldings undergoing alterations.

This issue was raised by the American Institute of Architects during hearings before the Subcommittee. The Committee does not intend that qualfied historic structures be altered in such a manner that would threaten or destroy their historical significance.

This issue has been addressed by Section 4.1.7(1) and (2) of UFAS. The Committee intends that these standards be used for historic buildings as designated under federal law and under similar state or local laws.

Section 505. Attorney's fees

Section 505 provides that courts or agencies may award attorney's fees including litigation expenses, and costs to a prevailing party for actions brought under the ADA. The Committee intends that the attorney's fee provision be interpreted in a manner consistent with the Civil Rights Attorney's Fees Act,[76] including that statute's definition of prevailing party, as construed by the Supreme Court.[77]

Litigation expenses include the costs of expert witnesses. This provision explicitly incorporates the phrase "including litigation expenses" to respond to rulings form the Supreme Court that items such as expert witness fees, travel expenses, etc., be explicitly included if intended to be covered under an attorney's fee provision.[78] further, such expenses are included under the rubric of "attorney's fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in *Christiansburg Garment.*

The Committee recognizes that the enforcement sections in titles I, II and III also include cross-referenced cites to attorney's fee provision in other laws, such as title VII and title II of the Civil Rights Act of 1964. Section 505 of this Act is a complimentary provision, which simply spells out clearly the elements that are included (and which the Committee assumes was always intended by Congress to be included) in such attorney's fee provisions.

Section 506. Technical assistance

Section 506(a) requires the Attorney General to develop and publish within 180 days a plan to assist covered entities and governments in understanding their obligations under the ADA. In developing this plan, the Attorney General is required to consult with the Secretary of Transportation, and the Chairs of the Equal Employment Opportunity Commission, National Council on Disability,

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[75] 49 Fed. Reg. 31528.

[76] 42 U.S.C. 1988.

[77] *See, Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 422 (1978) (a plaintiff shall not be assessed an opponent's attorney's fees unless a court finds that the plaintiff's claim is "frivolous, unreasonable or groundless."); *Hughes* v. *Rowe,* 449 U.S. 5 (1980).

[78] *See, Crawford Fitting Co.* v. *J.T. Gibbons,* 482 U.S. 437 (1987).

Architectural and Transportation Barriers Compliance Board and Federal Communications Commissions.

Section 506(b) allows the Attorney General to obtain assistance from other federal agencies.

Section 506(c) allows departments and agencies implementing the Act to render technical assistance to individuals and entities that have rights and responsibilities under the ADA. These departments and agencies are required to make technical assistance manuals available, within 6 months after final regulations have been issued.

Section 506(d) allows departments and agencies to make grants or enter into contracts for services necessary to effectuate the ADA, including the dissemination of information about rights and duties under the ADA, and the development and dissemination of information and technical assistance about techniques for effective compliance.

The Committee recognizes that the provision of technical information and assistance is important for effective implementation of the ADA. Because of the individualized nature of providing accommodations and removing barriers, technical information and assistance will aid persons in under their obligations under the law. Effective assistance will help to reduce unnecessary confusion and litigation over the requirements of the ADA.

Section 506(e) provides that covered entities are not excused from meeting the requirements of the ADA because of any failure to receive technical assistance or any failure by the appropriate agencies to develop or disseminate manuals. The Committee expects that assistance and manuals will be available in a timely fashion, but the lack thereof is not an excuse for noncompliance with the ADA.

Section 507. Federal wilderness areas

Section 507 requires the National Council on Disability to conduct a study and report to Congress within 1 year on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System.

Under current National Park Service regulations, wheelchairs (both manual and motorized) are allowed access onto park lands, including both designated public parks and protected wilderness areas.[79] Wheelchair users are considered by the Park Service to be pedestrians, and are treated the same way as pedestrians.

Section 508. Transvestites

Section 508 provides that the term "disabled" and "disability" shall not apply to an individual solely because that individual is a transvestite. Transvestism is also excluded from the definition of disability under Section 511.

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[79] 36 CFR 1.2(e), 1.4.

Section 509. Congressional inclusion

Section 509 provides that the ADA applies in its entirety to Congress, and provides an enforcement mechanism for the House of Representatives.

Section 510. Illegal use of drugs

Section 510 provides that an individual who is a current illegal user of drugs and is discriminated against on that basis in not considered an individual with a disability. The term "drugs" means controlled substances as listed in schedules I through V of Section 202 of the Controlled Substances Act.[80] The Controlled Substances Act makes unlawful the possession or distribution of listed drugs. The term "illegal use of drugs" does not include the use of controlled substances, including experimental drugs, taken under the supervision of a licensed health care professional. It also does not include uses authorized by the Controlled Substances Act or other provisions of federal law.

Section 510(a) and (b) are similar to sections 104(a) and (b) relating to employment, and should be interpreted in a consistent fashion.

Section 510(c) provides that if an individual is otherwise entitled to health or social services, that individual shall not be denied such services on the basis of current illegal use of drugs. For example, a current illegal user of drugs cannot be refused service at a hospital for a broken leg if that individual is otherwise entitled to that service. This is consistent with Section 407 of the Drug Abuse Office and Treatment Act of 1972,[81] and regulations implementing the Rehabilitation Act of 1973.[82]

Section 511. Definitions

Section 511(a) clarifies that homosexuality and bisexuality are not impairments and as such are not disabilities under the ADA. Sexual preference is not considered a disability under the ADA, and has not been considered a handicap under the Rehabilitation Act. Individuals who are homosexual or bisexual and are discriminated against because they have a disability, such as infection with the Human Immunodeficiency Virus, are protected under the ADA. The Committee specifically rejected amendments to exclude homosexuals with certain disabilities from coverage.

Section 511(b) clairifies that the definition of "disability" does not include the following conditions:

> Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairmants, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

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[80] 21 U.S.C. 812.

[81] 21 U.S.C. 1174.

[82] Appendix A—Analysis of final regulations, Subpart A—Definitions, 4. Drug Addicts and alcoholics, ¶ 5, 42 Federal Register 22686, reprinted in 45 CFR Part 84 Appendix A (1986).

These conditions are physical or mental impairments and would have been included under the ADA, but for this provision. Section 511 was not part of H.R. 2273 as introduced. This provision was adopted during Senate consideration of the bill, and was included with only minor clarifying changes in the bill adopted by the Committee

Section 512. Amendments to the Rehabilitation Act

This section makes amendments to the Rehabilitation Act to exclude protection for current illegal users of drugs when discrimination occurs on that basis, but to protect persons who are not current illegal users of drugs, and have been or are being rehabilitated, or are erroneously regarded as being illegal users of drugs. The Rehabilitation Act presently protects these individuals against discrimination as long as they are qualified to participate in the activity at issue or are qualified to perform the job and do not present a direct threat to property or the safety of others. Section 512 amends this standard so that the treatment of persons who engage in the current illegal use of drugs is parallel to Sections 104 and 511 of the ADA. The same definition for "drugs" as used in the ADA is also included in the Rehabilitation Act.

This section also amends the Rehabilitation Act to provide that if an individual is otherwise entitled to health services, or services provided under titles, I, II and III of the Rehabilition Act, that individuals cannot be denied such services on the basis of current illegal use of drugs. This is consistent with Section 407 of the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. 1174, and regulations implementing the Rehabilitation Act of 1973.[83] This provision is similar to Section 510(c) of the bill and should be interpreted in consistent fashion.

This section further amends the Rehabilitation Act regarding the ability of local education agencies to take disciplinary action based on the current illegal use of drugs or alcohol. Further, the amendment includes a provision regarding alcoholics whose current use of alcohol prevents them from performing the duties of the job in question or whose employment, by reason of the current alcohol abuse, would constitute a direct threat to the health or safety of others.

Section 513. Alternative Dispute Resolution

The Committee adopted this section during its consideration of the bill. This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.

This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions

of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in *Alexander* v. *Gardner-Denver Co.*[84] applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

Section 514. Severability

This section provides that if any provision of the ADA is found to be unconstitutional, such provision will be severed from the Act and will not affect the enforceability of the remaining provisions.

OVERSIGHT

Pursuant to clause 2(l)(3) of rule XI of the Rules of the House of Representatives, no oversight findings have been presented to the Committee by the Committee on Government Operations. The findings of the Committee on the Judiciary are incorporated throughout this report.

BUDGETARY INFORMATION

Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not provide new budgetary authority.

INFLATIONARY IMPACT

Pursuant to clause 2(l)(4) of rule XI of the rules of the House of Representatives, the Committee believes the legislation will have no significant inflationary impact on prices and costs in the operation of the national economy.

ESTIMATE OF COST

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee states that it concurs with the estimate submitted by the Congressional Budget Office as set forth below.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 15, 1990.

Hon. JACK BROOKS,
Chairman, Commitee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate of H.R. 2273, the Americans with Disabilities Act of 1990, as ordered reported by the Committee on the Judiciary on May 2, 1990.

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[84] 415 U.S. 36 (1974).

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

Attachment.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number H.R. 2273.
2. Bill title: Americans with Disabilities Act of 1990.
3. Bill status: As ordered reported by the House Committee on the Judiciary on May 2, 1990.
4. Bill purpose: To prohibit discrimination against people with disabilities in areas such as employment practices, public accommodations and services, transportation services and telecommunications services.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1991	1992	1993	1994	1995
Estimated authorization level	5	7	19	31	31
Estimated outlays	5	7	19	31	31

Basis of Estimate

Equal Employment Opportunities Commission (EEOC).—Title I—Employment —would prohibit discrimination by employers against qualified individuals with disabilities. H.R. 2273 would require the EEOC to issue regulations to carry out Title I and to provide for enforcement of the provisions. In addition, the EEOC would ensure the availability of a technical assistance manual to those entities with rights of responsibilities under this act. Although no specific authorization level is stated in the bill, CBO estimates the cost of these activities would be $1 million in fiscal year 1991, $2 million in fiscal year 1992, $15 million in fiscal year 1993, and $27 million annually in fiscal years 1994-95. This estimate is based on the EEOC's past experience with enforcing civil rights standards and assumes that approximately 259 additional full-time equivalent employees would be needed for the Commission's 50 field offices and that approximately 58 additional staff would be needed for the EEOC headquarters.

Department of Transportation.—H.R. 2273 would direct the Secretary of Transportation to issue regulations including standards applicable to the facilities and vehicles covered by these provisions. Also, the Secretary of Transportation would make available technical assistance manuals to those with rights and responsibilities under this act. CBO estimates that the cost to the federal government of developing these regulations and manuals would be about $0.5 million in fiscal year 1991. In addition, the federal government might bear some part of the costs of making transit services accessible to the handicappped, which are discussed below. The capital

and operating costs of most mass transit systems are heavily subsidized by the federal government through grants by the Urban Mass Transportation Administration. We cannot predict the extent to which these grants might be increased to compensate for the additional costs attributable to H.R. 2273.

Architectural and Transportation Barriers Compliance Board.—H.R. 2273 would require the board to issue minimum guidelines that would supplement existing minimum guidelines for accessible design of buildings, facilities and vehicles. Atlhough no specific authorization level is stated in the bill, CBO estimates the cost of these guidelines would be $0.2 million in fiscal year 1991. This estimate assumes salaries and expense costs of $104,000 and research contract costs of $80,000. Although the bill does not state specifically that the guidelines should be maintained, the board currently maintains the existing guidelines and most likely would maintain the new guidelines. CBO estimates the cost of maintaining the guidelines would be $0.2 million every other year beginning in fiscal year 1993.

Office of Technology Assessment (OTA).—The OTA would be required to undertake a study to determine (1) the needs of individuals with disabilities with regards to buses and (2) a cost-effective method for making buses accessible and usable by those with disabilities. In conjunction with this study, the OTA is directed to establish an advisory committee to assist with and review the study. Although no specific authorization level is stated in the bill, CBO estimates the cost of the study and advisory committee would be $0.2 million in fiscal year 1991, $0.3 million in 1992, and $0.1 million in 1993. This estimate is based upon the assumption that the OTA will not have to conduct significant additional field research.

Department of Justice.—H.R. 2273 also would require the Attorney General to develop regulations to prohibit discrimination in public services and to investigate alleged violations of public accommodation provisions, which would include undertaking periodic reviews of compliance of covered entities under Title III. These regulations would ensure that a qualified individual with a disability would not be excluded from participation in, or denied benefits by a department, agency, special purpose district or other instrumentality of a state or local government. In addition, H.R. 2273 would require the Department of Justice to make available technical assistance manuals to those with rights and responsibilities under this act. We estimate the cost of these activities would be $3 million in fiscal year 1991 and $4 million annually in fiscal years 1992-1995.

Federal Communications Commission (FCC).—H.R. 2273 requires the FCC to prescribe and enforce regulations with regard to telecommunications relay services. These regulations include: (1) establishing functional regulations, guidelines and operations for telecommunications relay services, (2) establishing minimum standards that shall be met by common carriers, and (3) ensuring that users of telecommunications relay services pay rates no greater than rates paid for functionally equivalent voice communication services with respect to duration of call, the time of day, and the distance from point of origination to point of termination. In addition, H.R. 2273 would require the FCC to make available technical assistance

manuals to those with rights and responsibilities under this act. While no authorization level is stated, CBO estimates the cost of developing and enforcing these regulations to be $0.1 million in fiscal year 1991, $0.1 million in fiscal year 1992, $0.2 million in 1993, $0.2 million in 1994, and $0.1 million in 1995.

National Council on Disability.—H.R. 2273 would require the council to conduct a study on the effect that wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System. Although no authorization level is stated, CBO estimates the cost of this study would be $0.2 million in fiscal year 1991 and $0.1 million in fiscal year 1992.

Other Possible Effects.—In addition to the federal costs of establishing and enforcing new regulations, H.R. 2273 could also affect the federal budget indirectly through changes in employment and earnings. If employment patterns and earnings were to change, both federal spending and federal revenues could be affected. There is, however, insufficient data to estimate these secondary effects on the federal budget.

6. Estimated cost to State and local governments: Enactment of H.R. 2273 would result in substantial costs for state and local governments, but CBO cannot estimate the total impact with any certainty. Most of these costs would involve actions required to make public transit systems accessible to the handicapped. In addition, some local governments might incur additional costs to make newly-constructed public buildings accessible, as required by this bill, but most already face similar requirements.

Public Buildings.—H.R. 2273 wold mandate that newly constructed state and local public buildings be made accessible to the handicapped. All states currently mandate accessibility in newly-constructed, state-owned public buildings and therefore would incur little or no costs if this bill were to be enacted. It is possible, however, in rare cases, for some local governments not to have such law. These municipalities would incur additional costs for making newly-constructed, locally-owned public buldings accessible if this bill were to become law. According to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs if the accessibility features are included in the original building design. Otherwise, the costs could be much higher.

Public Transit.—CBO cannot provide a comprehensive analysis of the impact of H.R. 2273 on mass transit costs of state and local governments. The scope of the bill's requirements in this area is very broad, many provisions are subject to interpretation, and the potential effects on transit systems are significant and complex. While we have attempted to discuss the major potential areas of cost, we cannot assign a total dollar figure to these costs.

H.R. 2273 would require that all new buses and rail vehicles be accessible to handicapped individuals, including those who use wheelchairs, and that public transit operators offer paratransit services as a supplement to fixed route public transportation. In addition, the bill includes a number of requirements relating to the accessibility of mass transportation facilities. Specifically, all new

facilities, alterations to existing facilities, intercity rail stations, and key stations in rapid rail, commuter rail, and light rail systems would have to be accessible to handicapped persons.

Bus and Paratransit Services.—CBO estimates that it would cost between $20 million and $30 million a year over the next several years to purchse additional lift-equipped buses as required by H.R. 2273. Additional maintenance costs would increase each year as lift-equipped buses are acquired, and would reach $15 million by 1995. The required paratransit systems would add to those costs.

Based on the size of the current fleet and on projections of the American Public Transit Association (APTA), CBO expects that public transit operators will purchase about 4,300 buses per year, on average, over the next five years. About 38 percent of the existing fleet of buses is currently equipped with lifts to make them accessible to handicapped individuals and, based on APTA projections, we estimate that an average of 55 percent to 60 percent of future bus purchases will be lift-equipped in the absence of new legislation. Therefore, this bill would require additional annual purchases of about 1,800 lift-equipped buses. Assuming that the added cost per bus for a lift will be $10,000 to $15,000 at 1990 prices, operators would have to spend from $20 million to $30 million per year, on average, for bus acquisitions as a result of this bill.

Maintenance and operating costs of lifts have varied widely in different cities. Assuming that additional annual costs per bus average $1,500, we estiamte that it would cost about $2 million in 1991, increasing to $15 million in 1995, to maintain and operate the additional lift-equipped buses required by H.R. 2273.

In addition, bus fleets may have to be expanded to make up for the loss in seating capacity and the increase in boarding time needed to accommodate handicapped persons. The cost of expanding bus fleets is uncertain since the extent to which fleets would need to be expanded depends on the degree to which handicapped persons would use the new lift-equipped buses. If such use increases significantly, added costs could be substantial.

These costs are sensitive to the number of bus purchases each year, which may vary considerably. In addition, these estimates reflect total costs for all transit operators, regardless of their size. Costs may fall disproportionately on smaller operators, who are currently more likely to choose options other than lift-equipped buses to achieve handicapped access.

The bill also requires transit operators to offer paratransit or other special transportation services providing a level of service comparable to their fixed route public transportation. Because we cannot predict how this provision will be implemented, and because the demand for paratransit services is very uncertain, we cannot estimate the potential cost of the paratransit requirement, but it could be significant. The demand for paratransit services probably would be reduced by the greater availability of lift-equipped buses.

New regulations recently proposed by the Department of Transportation concerning bus and paratransit services include requirements much the same as those in H.R. 2273. Should these proposed rules become final in their current form, the mandates of the bill would have much less effect.

Transit Facilities.—We expect that the cost of compliance with the provisions concerning key stations would be significant for a number of transit systems, and could total several hundred million dollars (at 1990 prices) over 20 years. The precise level of these costs would depend on future interpretation of the bill's requirements and on the specific options chosen by transit systems to achieve accessibility. The costs properly attributable to this bill would also depend on the degree to which transit operators will take steps to achieve accessibility in the absence of new legislation.

In 1979, CBO published a study, (*Urban Transportation for Handicapped Persons: Alternative Federal Approaches,* November 1979), that outlined the possible costs of adapting rail systems for handicapped persons. In that study, CBO estimated that the capital costs of adapting key subway, commuter and light rail stations and vehicles for wheelchair users would be $1.1 billion to $1.7 billion, while the additional annual operating and maintenance costs would be $14 million to $21 million.

Based on a 1981 survey of transit operators, the Department of Transportation has estimated that adapting existing key stations and transit vehicles would require additional capital expenditures of $2.5 billion over 30 years and would result in additional annual operating costs averaging $57 million (in 1979 dollars) over that period. Many groups representing the handicapped asserted that the assumptions and methodology used by the transit operators in this survey tended to severely overstate these costs. The department estimated that the cumulative impact of using the assumptions put forth by these groups could lower the total 30-year costs to below $1 billion.

CBO believes that the figures in both these studies significantly overstate the cost of the requirements of H.R. 2273, because, in the intervening years, several of the major rail systems have begun to take steps to adapt a number of their existing stations for handicapped access. In addition, it seems likely that the number of stations that would be defined as "key" under this bill would be much lower than that assumed in either of those studies. Furthermore, the Metropolitan Transit Authority in New York and the Southeastern Pennsylvania Transportation Authority in Philadelphia, two large rail systems, have entered into settlement agreements with handicapped groups that include plans for adaptation of key stations. These plans would probably satisfy the bill's requirement for accessibility of key stations. Other rail systems are also taking steps to make existing stations accessible. Therefore, we expect that the cost of the bill's requirements concerning key stations would probably not be greater than $1 billion (in 1990 dollars) and might be considerably less.

7. Estimate comparison: None.

8. Previous CBO estimate: CBO prepared an estimate of S. 933, the Americans with Disabilities Act of 1989, as ordered reported by the Senate Committee on Labor and Human Resources on August 2, 1989. We also prepared estimates of other versions of H.R. 2273, the Americans with Disabilities Act of 1989: as ordered reported by the House Committee on Education and Labor on November 14, 1989; as ordered reported by the House Committee on Energy and Commerce on March 13, 1990; and as ordered reported by the

House Committee on Public Works and Transportation on April 3, 1990. The estimates in this bill are similar to those for the versions of H.R. 2273 ordered reported by the House Committees and are substantially different from those in the Senate bill.

9. Estimate prepared by: Cory Leach and Marjorie Miller.

10. Estimate approved by: C.G. Nuckols (For James L. Blum, Assistant Director for Budget Analysis).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * * * * *

APPLICATION OF ACT

SEC. 2. (a) * * *

(b) Except as provided in [section 223 or 224] *section 223, 224, and 225* and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with instrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

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TITLE II—COMMON CARRIERS

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SPECIAL PROVISIONS RELATING TO TELEPHONE COMPANIES

SEC. 221. (a)

(b) Subject to the provisions of [section 301] *sections 225 and 301,* nothing in this Act shall be construed to apply, or to give the

Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

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SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

(a) DEFINITIONS.—As used in this this section—

(1) COMMON CARRIER OR CARRIER.—The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h), any common carrier engaged in interastate communication by wire or radio, and any common carrier engaged in both interstate and intrastate communications, notwithstanding sections 2(b) and 221(b).

(2) TDD.—The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communications in the transmission of coded signals through a wire or radio communication system.

(3) TELECOMMUNICATIONS RELAY SERVICES.—The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES.—

(1) IN GENERAL.—In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commisson shall ensure that interstate and intrastate telecommunications relay services are available, to extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) REMEDIES.—For purposes of this section, the same remedies, procedures, rights, and obligations under this Act that are applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication by wire or radio and common carriers engaged in both interstate and intrastate communication by wire or radio.

(c) PROVISION OF SERVICES.—Each common carrier providing telephone voice transmission services shall provide telecommunications

relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment of this section.

(d) REGULATIONS.—

(1) IN GENERAL.—The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that—

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met by common carriers in carrying out subsection (c);

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communications services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from refusing calls or limiting the length of calls that use telecommunications realy services.

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such converstation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) TECHNOLOGY.—The Commission shall ensure that regulations prescribed to implement this section encourage the use of existing technology and do not discourage or impair the development of improved technology.

(3) JURISDICTIONAL SEPARATION OF COSTS.—

(A) IN GENERAL.—The Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) RECOVERING COSTS.—Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from the interstate jurisdiction and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.

(C) JOINT PROVISION OF SERVICES.—To the extent interstate and intrastate common carriers jointly provide telecommunications relay services, the procedures established in section 410 shall be followed, as applicable.

(4) FIXED MONTHLY CHARGE.—The Commission shall not permit carriers to impose a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunication relay services.

(5) UNDUE BURDEN.—If the Commission finds that full compliance with the requirements of this section would unduly burden one or more common carriers, the Commission may

extend the date for full compliance by such carrier for a period not to exceed 1 additional year.

(e) ENFORCEMENT.—

(1) IN GENERAL.—Subject to subsections (f) and (g), the Commission shall enforce this section.

(2) COMPLAINT.—The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) CERTIFICATION.—

(1) STATE DOCUMENTATION.—Each State may submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services.

(2) REQUIREMENTS FOR CERTIFICATION.—After review of such documentation, the Commission shall certify the State program if the Commission determines that the program makes available to hearing-impaired and speech-impaired individuals either directly, through designees, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets the requirements of regulations prescribed by the Commission under subsection (d).

(3) METHOD OF FUNDING.—Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) SUSPENSION OR REVOCATION OF CERTIFICATION.—The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer waranted.

(g) COMPLAINT.—

(1) REFERRAL OF COMPLAINT.—If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

(2) JURISDICTION OF COMMISSION.—After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

(A) final action under such State program has not been taken on such complaint by such State—

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f).

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REHABILITATION ACT OF 1973

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DEFINITIONS

SEC. 7. For the purposes of this Act: (1)

* * * * * * *

(8)(A) * * *

(B) [Subject to the second sentence of this subparagraph,] *Subject to subparagraphs (C) and (D),* the term "individual with handicaps" means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. [For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.]

(C) For purposes of subchapter V of this Act the term "individual with handicaps" does not include an individual who is a current illegal user of drugs, when a recipient acts on the basis of such use.

[(C)] *(D)* For the purposes of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

* * * * * * *

(22) The term "drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. The term "illegal use of drugs" does not mean the use of controlled substances taken under supervision of a licensed health professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

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ADDITIONAL VIEWS OF HON. F. JAMES SENSENBRENNER, JR., HON. BILL McCOLLUM, HON. GEORGE W. GEKAS, HON. WILLIAM E. DANNEMEYER, HON. LAMAR S. SMITH, AND HON. CRAIG T. JAMES

We are concerned that Section 107 of the Americans with Disabilities Act linking the employment remedies under the Act to remedies available under Title VII of the Civil Rights Act of 1964 should be amended to clarify that the ADA only calls for equitable relief as a remedy for employment discrimination.

If the remedies provision of the ADA is to be changed, there should be a conscious debate and a conscious vote on the issue, rather than a "bootstrap" to the pending Civil Rights Act of 1990.

BACKGROUND

As originally introduced, the Americans with Disabilities Act (H.R. 2273 and S. 933) would have provided greater remedies for the disabled than provided under current Title VII law. H.R. 2273 originally contained the following provision:

> SEC. 205. ENFORCEMENT.
>
> The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9), and the remedies and procedures available under section 1981 of the Revised Statues (42 U.S.C. 1981) shall be available, with respect to any individual who believes that he or she is being or about to be subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 204, concerning employment.

The highlighted portion of the statute references Section 1981 of the Civil Rights Act of 1866. Section 1981 has been interpreted by the court to allow for recovery of punitive and compensatory damages and jury trials in certain cases of employment discrimination. Inclusion of this language in the original version of the ADA would have allowed the recovery of expanded damages and jury trials for employment discrimination against the disabled under the ADA.

After intense negotiations between the Senate and the Bush Administration, an agreement was reached in August of 1989 to, among other items, delete the reference to Section 1981 procedures from the employment remedies provision in exchange for broadening the coverage under the public accommodations title. Thus, the ADA's employment remedies were limited to current Title VII remedies: back pay, injunctive relief, reinstatement and attorneys' fees. With this significant change, the Bush Administration and the business community gave their support to the bill. The Senate

passed the bill on September 7, 1989 by a vote of 76 to 8 and it was sent to the House for consideration.

Four Committees of the House reviewed the Americans with Disabilities Act: the Committee on Education and Labor, Energy and Commerce, Public Works and Transportation and the Judiciary Committee. Of these Committees, Judiciary and Education and Labor have had jurisdiction to review Title I of the ADA prohibiting discrimination in employment against the disabled. In October and November or 1989, the Subcommittee on Civil and Constitutional Rights held hearings on H.R. 2273. On November 14, 1989, the Committee on Education and labor reported a version of H.R. 2273 which incorporated the changes made in S. 933 and as modified through additional negotiations among the Committee members.

On February 7, 1990, Senator Kennedy and Representative Hawkins introduced the Civil Rights Act of 1990 (H.R. 4000 and S. 2104). H.R. 4000 would exppand damages available in Title VII actions to authorize punitive and compensatory damages and jury trials. Because of the cross-reference to Title VII, amendment of Title VII as proposed in the Civil Rights Act of 1990 would amend the employment discrimination remedies of the ADA to provide for the expanded remedies.

At the time that the Subcommittee on Civil and Constitutional Rights held its hearings and the Committee on Education and Labor reported on the bill, the damages available for employment discrimination were limited to current Title VII remedies. Thus, the expansion of remedies proposed by H.R. 4000 had not previously been considered by the House and in fact had been explicitly rejected by the Senate in the context of the Americans with Disabilities Act.

Proposed Amendment

Congressman Sensenbrenner offered an amendment in the Subcommittee on Civil and Constitutional Rights and at the Full Judiciary Committee Markup to "de-link" the remedies for employment discrimination in the Americans with Disabilities Act from the remedies contained in Title VII of the Civil Rights Act of 1964 amendments.

The amendment offered would have incorporated the remedies and procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964 while limiting the remedies to current Title VII remedies: injunctive relief, attorneys' fees and back pay. The amendment was defeated in the Full Committee by a voice vote.

The amendment was offered for two reasons. First, the Administration and the business community view the possible effect of H.R. 4000 on the ADA as a substantial breach of the agreement reached last year with the Senate on the ADA.

In anticipation of the Judiciary Committee markup of the Americans with Disabilities Act, Attorney General Thornburgh sent a letter to Congressman Hamilton Fish, Jr., the Ranking Minority Member of the House Judiciary Committee on March 12, 1990. The letter stated,

A very critical element of this bill was that, as under Title VII of the CIvil Rights Act of 1964, the remedies it made available for violations of the employment title were limited to non-damage remedies that can be obtained in a trial before a judge. That formulation was crucial to the thrust and structure of a number of critical sections of the legislation. Because we were emulating the remedial scheme of Title VII, those remedies were simply incorporated by reference. In return, the Administration agreed to broad coverage under the public accommodations title, e.g. retail stores, doctors' and lawyers' offices, drug stores and grocery stores—all establishments necessary for people with disabilities to be truly in the mainstream. This coverage is much broader than Title II of the Civil Rights Act of 1964, which essentially prohibits discrimination on the basis of race in hotels, motels, restaurants, gas stations, and places of public entertainment.

The Kennedy-Hawkins bill would greatly expand the remedies available under Title VII and hence, by reference, the remedies in the employment title of the ADA. The Administration is opposed to that aspect of Kennedy-Hawkins, as stated in our testimony on that legislation. The ADA need not be held hostage to the legislative outcome on Kennedy-Hawkins, however, in order to ensure that a critical element of the agreement struck previously will be observed.

Second, expansion of remedies, especially in the context of a new and comprehensive piece of legislation is ill-advised. Employers and employees have had more than 25 years of experience with the procedures and remedies of Title VII for discrimination based on race, color, religion, sex or national origin. In enacting Title VII and other employment discrimination statutes, Congress has consistently pursued a policy of encouraging mediation and conciliation in resolving disputes and in avoiding unnecessary litigation. The current remedies of Title VII are equitable, that is, they are intended to restore the individual to the position he or she would have been in but for the discrimination. As stated above, the relief available includes injunctions, back pay, promotion, reinstatement and attorneys' fees.

Although federal agencies and recipients of federal funds have been covered under the Rehabilitation Act prohibiting discrimination against the disabled since 1973, the "mainstream" of society, "the retail stores, doctors' and lawyers' offices, drug stores and grocery stores" have no experience in compliance with anti-discrimination laws against the disabled. The possibility of a compensatory and/or punitive damages award and a jury trial in employment disputes, therefore, raises the stakes much higher. In order to be effective at eliminating discrimination against the disabled, the active cooperation of business will be required.

We urge our colleagues to consider the consequences of the failure to remedy this problem. We should not let this dispute over remedies in the ADA undermine its promise and the business community's response to it. The employment titles of the ADA should

be amended so that it clearly reflects the remedies of back pay, injunctive relief and attorneys fees as it was originally intended. To do otherwise is to take the risk of postponing, once again, the civil rights of many disabled Americans.

F. JAMES SENSENBRENNER, Jr.
GEORGE W. GEKAS.
CRAIG T. JAMES.
BILL MCCOLLUM.
WILLIAM E. DANNEMEYER.
LAMAR SMITH.

DISSENTING VIEWS OF HON. CHUCK DOUGLAS

Four different House committees have studied the Americans with Disabilities Act, and each has adopted amendments which greately clarify a poorly drafted bill which raced through the Senate attracting very little consideration. The original version was vague and subject to varying interpretations by those who would benefit from its provisions, as well as those who would be required to take the required corrective actions.

One of my amendments, which was unanimously adopted, specifically limited the rights and procedures available under the ADA to those which are available to women and minorities under Title VII of the Civil Rights Act of 1964. Without this amendment, persons claiming discrimination could have gone directly to court, avoiding all attempts at mediation and could have sued for all kinds of damages which were not anticipated by Congress. I am pleased the committee saw the wisdom of my remedies language.

Another amendment which was passed, addressed a concern which I had initially raised. That amendment, further defined *when* an employer could refuse to hire or continue to employ an employee. If the employee would pose a "direct threat" to the health or safety of individuals in the work place, the employer has a defense for refusing to hire that individual. The amendment clarified that a "direct threat" is one which would place those other workers at a "significant risk" from any harm. This was needed in order to address my concern about dangerous or unbalanced workers threatening co-workers.

I still have serious problems with those employers who are covered by the bill and those who are not. Even though the same exemption exists in the Civil Rights Act of 1964, I question the provision in the employment title of the bill which exempts "a bona fide private membership club (other than a labor organization) that is exempt from section 501(c) of the Internal Revenue Code." This bill should include as many organizations as possible and not just the businesses of this country which are *trying* to make profits.

It is also incredible to me that the largest employer in this country, the Federal Government, is exempt from this bill! While other laws are said to cover the Federal Government's responsibilities to the disabled, those laws do not contain the exact same provisions as this bill. How can we tell every State and political subdivision, as well as every business employing over 15 people, that they must comply but then say our largest employer does *not* have to comply with the same law. *All of us* are going to be *very embarrassed* when we try to explain why even churches must comply but the Federal Government and golf clubs get off scot-free. Churches should be exempt because of the First Amendment to the Constitution, but under this legislation those rights are violated.

It is my opinion that we are further complicating this area of law by introducing an almost impossible standard for employers to meet with the requirement that they must justify *all* their actions regarding the disabled as a "business necessity." The current standard which is applied in discrimination cases for women and minorities is "legitimate business purpose." Why complicate the law by establishing a new standard which does not parallel the law with other minority groups?

I believe that still more consideration should be given to the public safety issue at the pre-hire stage. When a police or sheriff's department is considering hiring an individual who will handle a deadly weapon, it should be free to inquire as to an individual's mental stability, well *before* it has extended an offer of employment. The City of Los Angeles is an excellent example. According to Dr. Sheldon Kay, Chief Psychiatrist for the Los Angeles Police Department, *before* an applicant is extended an invitation to attend the police academy, the individual is given a battery of medical tests and undergoes a background check. The very last test the individual undergoes is a psychological test and interview to determine if the individual is stable enough to perform the duties of a police officer.

The way the legislation now reads, *none* of these tests could be run until *after* an offer of employment has been extended, even though that offer may be conditioned on succesfully passing these tests. According to Dr. Kay, moving the timing of the test to the *end* of the hiring sequence would be extremely disruptive. As things currently stand, once an applicant has an offer of employment he gives notice to his or her present employer. Under the legislation as drafted, he would not be certain he had a job until after he had passed all the exams. Dr. Kay indicated that an applicant could be in the embarrassing position of telling his associates that he had been offered a position and then have to tell them he had failed the mental stability test portions of the job.

In essence, a department would have to offer everybody a job and then test to see who was disqualified totally rather than being able to weed out unqualified applicants at any point during the process. This would certainly place a chilling effect on these types of tests which are designed to *protect* the public safety. Hundreds of other police and private security agencies work this way. Does it not make sense for these departments to be able to screen out individuals who cannot perform the "essential functions" of the job *before* they even consider hiring an individual? Let's not make the job of the police even tougher than it is.

We also do not want to force establishments like restaurants out of business causing the ultimate "undue hardship." Under H.R. 2273, as presently drafted, a food service operator could not even *transfer* an employee with AIDS, or one who has tested positive for the AIDS virus out of a food-handling position even if the employer continued to pay the same wages and benefits. The reasons the employer could not are the following:

(1) The person *does not* pose a direct threat to the health and safety of other workers and patrons. Center for Disease Control guidelines consistently state that the AIDS virus is not transmitted through food or drink or casual contact.

(2) While the disease is in the very early stages, an employee could certainly continue to perform the essential functions of the job because he or she would not "be sick."

Unfortunately, there are many Americans who panic at the mention of the word AIDS and would refuse to patronize any food establishment if an employee were known to have the virus. Very few restaurants have the luxury of a captive audience of customers who have no place else to go to get a meal. It is a very competitive business, and for the restaurant with an employee known to have AIDS, it will translate to *no customers* and *no business* at all. With over 600,000 restaurants in this country all you need to do is go to another establishment down the street. It will be too late after the business has lost all its customers for "the undue harship" defense to do much good.

There are also sections of the bill which either have not been explained carefully or are not capable of being understood. A good example comes in Section 501(c) which deals with insurance. After spending a great deal of time explaining what insurance plans are permissible, the Act seems to say that these same plans which were previously approved are not permissible if they act as a subterfuge to the purposes of the Act. What does that mean? How does an employer or employee know when a subterfuge has been created?

One of the purposes of this and every piece of legislation is to provide a basis for reasonable expectation between parties in conflict. Even though great strides have been made in cleaning up this bill in that regard, it is still nebulous. What the meaning of "undue hardship" or "reasonable accommodation" is will vary depending upon where you sit. This legislation should attempt to narrow the gap between those expectation levels. At this point, those expectations are left for courts all over this country to decide. No one will ever be certain that they have complied. Let's make them at least a little more certain. Congress is abrogating it constitutional duty by writing vague laws which must be clarified by the Federal courts. Our *responsibility* is to write laws which can be clearly understood when reading them—not have another branch of government do our job.

CHUCK DOUGLAS.

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